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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ADVANCED COMMUNICATIONS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Communications Act provides that the Federal Communications Commission may not base a decision on "the expectation of Federal revenues" to be derived from an auction of broadcast spectrum. 47 U.S.C. § 309(j)(7)(A). In this case, the Commission revoked petitioner's permit to provide direct broadcast satellite service, reclaimed the spectrum allocated to petitioner, and auctioned it off for $735 million in proceeds to the Treasury. The questions presented are:

(1) Whether a court should apply heightened scrutiny to a government agency decision to reclaim assets when the reclaimed assets will be auctioned off, with the proceeds going to the government.

(2) Whether the Court of Appeals erred in concluding that the expectation of revenues was not a factor in the Commission's decision to revoke petitioner's permit, solely because the Commission did not say that it was, where (a) revoking the permit allowed the Commission to auction petitioner's spectrum for $735 million; (b) Congress applied extraordinary pressure on the Commission to auction the spectrum because of the anticipated revenues; (c) the Commission's decision made express reference to the hundreds of millions of dollars an auction would raise; (d) one Commissioner indicated on the record that while this case was pending a colleague asked him if the promised $175 million opening bid of a company vying for petitioner's spectrum persuaded him to hold an auction; (e) the Commission Chairman indicated in public statements that his vote was influenced by revenue considerations and Congress' views; and (f) the decision was inconsistent with Commission precedents and policy.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Advanced Communications Corporation, along with TEMPO DBS, Inc., and PRIMESTAR Partners L.P., were the appellants in the Court of Appeals; the Federal Communications Commission was the appellee. The Consumer Federation of America, the Center for Media Education, Directsat Corporation, DIRECTV, Inc., EchoStar Satellite Corporation, MCI Telecommunications Corporation, and United States Satellite Broadcasting Company, Inc., intervened in the court below on the side of the Commission.

Advanced Communications Corporation has no parent companies or nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Advanced Communications Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported but the judgment is noted at 84 F.3d 1452 (table). The opinion is reprinted in the appendix hereto ("App.") at 1a. The opinion of the Federal Communications Commission is reported at 11 FCC Rcd 3399 and is reprinted at App. 12a. The opinion of the Commission's International Bureau is reported at 10 FCC Rcd 13337 and is reprinted at App. 79a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1996. App. 1a. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing

in banc on June 27, 1996. *Id.* at 10a-11a. The jurisdiction of the Court of Appeals was based on 47 U.S.C. § 402(b). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The provisions of 47 U.S.C. § 309(j)(7) and 47 C.F.R. § 100.19 (1995) are reproduced at App. 92a-93a.

INTRODUCTION

Petitioner Advanced Communications Corporation ("Advanced" or "ACC") is one of the pioneers in the development of direct broadcast satellite ("DBS") technology and service. DBS—a system providing satellite delivery of video programming directly to homes via small, inexpensive receiving dishes—is a cutting edge technology. Although first authorized by the Federal Communications Commission ("FCC" or "Commission") in 1982, DBS service just recently achieved technological feasibility and commercial viability. As the DBS industry evolved, the FCC found it necessary to grant extensions of the permits it had granted to those seeking to provide DBS service. Up until the time when Advanced requested the extension at issue here, the FCC had in fact granted *every* such request. Shortly before considering Advanced's request, however, the Commission was given a new power —the power to auction off spectrum allocations to the highest bidder, with the proceeds going to the Federal Treasury. Spectrum for the newly viable DBS service was a lucrative candidate for auction, but none was available —unless there was some way to reclaim spectrum from existing permittees.

There was. For the first time ever, the Commission, by a 3-2 vote, denied a request for extension of a construction permit—Advanced's—and reclaimed Advanced's spectrum for auction. The auction generated $735 million for the government, while Advanced was left with nothing. As one of the dissenting Commissioners put it, the majority "changed the DBS due diligence rules in the

middle of the game, unlawfully and unfairly disadvantaging an innocent participant," giving "companies that chose to sit out the hard developmental days of DBS a windfall chance to participate in a gold rush, [while leaving] one of the pioneers of the DBS service with only a panful of mica." App. 71a, 78a (dissenting statement of Commissioner Quello).

The court below, however—in affirming the Commission decision—chose to treat the case as if it were a typical one in which agency action is subject to only deferential review. In particular, the court refused to apply more exacting scrutiny in light of the government's clear financial self-interest in the outcome of the proceeding, instead concluding that the prospect of auction revenues played no role in the Commission's decision, solely because the Commission did not say that it did. These fundamental errors in approach conflict with guidance in this Court's precedents, have significance beyond the confines of this case, and fully warrant this Court's review.

STATEMENT OF THE CASE

Background. When it first authorized DBS service, the FCC required DBS permittees—under its "due diligence" rules—to begin operating their satellites within six years of the grant of a permit, "unless otherwise determined by the Commission upon proper showing in any particular case." 47 C.F.R. § 100.19(b) (1995). After receiving its initial DBS permit in 1984, Advanced worked vigorously toward the goal of providing DBS service. It was the first permittee to propose and develop technical plans for DBS digital transmission, now the state of the art, and the first permittee to advocate interactive DBS service, and was instrumental in shaping the regulatory and commercial framework necessary to make DBS service a reality. C.A. App. 437-438.

Rapid changes in the nascent industry, however, made the task of initiating DBS service far more difficult than the FCC had first envisioned. Indeed, the FCC has acknowledged that it "could not have foreseen the tech-

nological advances that the service has experienced, nor did it have an opportunity to fashion its rules based on experience with the actual operation of the service." *Id.* at 114. Thus, as Advanced persevered, more than half of those who had been awarded DBS permits—including such large and established media corporations as CBS, Comsat, and RCA American Communications—dropped out or merged with other applicants. *Id.* at 435. No DBS permittee was able to complete construction of a satellite within six years, as the FCC's rules contemplated. In fact, it was not until October 1994—a full 12 years after the FCC began issuing permits—that *any* DBS service was available, when two permittees jointly launched DIRECTV and USSB. App. 27a.

The Commission therefore adopted a flexible approach to its due diligence rules, routinely granting requests for extensions of time to commence service. The Commission recognized that these extensions promoted "the public interest in the prompt initiation of DBS service," *United States Satellite Broadcasting Co.*, 3 FCC Rcd 6858, 6861 (1988) ("*USSB I*"), in light of the ongoing efforts of permittees to develop their systems in the face of unanticipated technical, commercial, and other difficulties. Consistent with this policy, Advanced received in 1991 an initial extension of its construction permit, until December 1994. App. 3a.

The FCC's policy continued into a round of second extensions for permittees. For example, in 1992 the Commission granted USSB a second extension, awarding it an additional five years to construct and operate its DBS system. *United States Satellite Broadcasting Co.*, 7 FCC Rcd 7247, 7249 (Mass Med. Bur. 1992) ("*USSB II*"). Likewise, in 1993 the Commission granted Dominion a second extension to complete its system, until December 1996, even though Dominion had not yet begun building any satellites. *Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680 (1993) ("*Dominion*"), *recon. denied*, 10 FCC Rcd 12743 (1995).

By the same token, the FCC acknowledged the desirability of permittees "combin[ing] assignments and resources through merger or buyout" to expedite DBS service. *Continental Satellite Corp.*, 4 FCC Rcd 6292, 6299 (1989). Thus, shortly before its decision in this case, the Commission approved the sale by Directsat of its permit to EchoStar, even though the permit was due to expire in seven months and Directsat still had no satellites under construction. *Directsat Corp.*, 10 FCC Rcd 88 (1995). Shortly after its decision in the instant case to refuse Advanced an extension, the FCC *granted* the extension of the Directsat permit that was implicit in its approval of the transfer. *Directsat Corp.*, 11 FCC Rcd 1775 (Int'l Bur. 1996).

During its first extension period, Advanced sought to develop its DBS system in conjunction with another permittee, EchoStar. The two permittees signed a letter of intent to form a joint venture, coordinated system designs and budgets, and met with Commission staff to discuss the proposed venture's satellite system. When the EchoStar venture fell through, Advanced promptly made alternative arrangements to facilitate service. On September 16, 1994, it entered into a contract with TCI to obtain two substantially completed satellites, the first of which would have been ready for launch in April 1996. In exchange for the satellites and other specified consideration, Advanced agreed to provide TCI with all of the satellite transponder capacity. Advanced, however, was to retain ultimate control of the satellite's design, construction, launch, deployment, operation and insurance, as well as tracking and telemetry. Because Advanced's permit was due to expire before the anticipated launch, it requested an additional extension of time in which to complete its system. C.A. App. 389-391, 441-442. As noted, the Commission had granted every other such request. This time, however, something had changed.

The FCC's New Auction Authority. It had long been the FCC's practice to assign spectrum through lotteries or comparative hearings. In 1993, however, the Commu-

nications Act was amended to give the FCC authority to allocate spectrum by auction. *See* 47 U.S.C. § 309(j). The FCC's auction authority enabled the Commission, for the first time, to turn the allocation of spectrum into a profit-making enterprise—and an extremely lucrative one at that.[1]

The auction statute authorizes the FCC to issue licenses and permits through competitive bidding so long as the Commission employs "safeguards to protect the public interest in the use of spectrum" and seeks to promote the purposes of the Communications Act, including, among other things, "the development and rapid deployment of new technologies, products, and services for the benefit of the public." 47 U.S.C. § 309(j)(3)(A). Lest the advancement of the public interest be trumped by the government's pecuniary interest, the statute expressly prohibits the FCC from basing a decision on anticipated auction revenues. *Id.* § 309(j)(7)(A).

Nevertheless, the FCC's auction authority has reaped staggering sums for the Treasury. Indeed, since the FCC began auctioning spectrum in 1994, the Commission has raised over $15 billion. *See infra* at 12. The magnitude of the FCC's auction-derived revenues has been much touted by FCC Chairman Reed Hundt, who unabashedly stated in a public speech that "FCC stands for Federal Cash Cow." Hundt, Speech at National Consumers Week Symposium, Oct. 26, 1995 (as prepared for delivery). He used the term "Federal Cash Cow" again in a letter responding to then-presidential candidate Steve Forbes' call for abolition of the agency, and added that the FCC is also "the goose that lays the golden eggs." Broadcasting & Cable, Oct. 30, 1995, at 88.

Chairman Hundt has pointed to the billions raised by FCC auctions in resisting congressional attempts to cur-

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[1] The FCC is authorized to retain from the proceeds of any auction "such sums as may be necessary * * * for the costs of developing and implementing" the auction program; remaining proceeds are deposited in the Federal Treasury. 47 U.S.C. § 309(j)(8)(A), (B).

tail his agency's budget.[2] Appearing before a congressional subcommittee considering the FCC's annual appropriation, Chairman Hundt testified that "the FCC happens to be in all of the annals of government, around the globe, the largest single government profit center. We are the Federal Auction Commission in that sense, and we have raised nearly $9 billion in auctions so far." *Reauthorization of the Federal Communications Commission: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce*, 104th Cong., 1st Sess. 8 (1995) ("Appropriation Hearings"). Chairman Hundt has proposed funding the FCC's entire budget from auction proceeds. *See id.* at 14-15. In short, there can be no doubt that the highest ranks of the FCC perceive the maximization of auction revenues to be a central part of the FCC's mission.

The Decision of the FCC International Bureau. In April 1995, the FCC's newly-created International Bureau, in its very first decision involving DBS, ruled that Advanced's extension request should be denied and its spectrum reclaimed. App. 79a. Undeniably misconstruing FCC precedent,[3] the Bureau held that Advanced had not satisfied the Commission's due diligence rules. *Id.* at 84a-89a. Advanced promptly petitioned the full Commission for review. C.A. App. 426-516.

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[2] When a Senate subcommittee voted to cut the FCC's budget by 20%, Chairman Hundt "called the action 'a mistake' that could result in an end to the FCC spectrum auctions. * * * 'The Senate appropriations subcommittee would kill this cash cow, even while we're trying to milk it for billions more dollars in auction revenue.'" Stern, *Hundt Calls Budget Slash "Mistake"*, Broadcasting & Cable, Sept. 11, 1995, at 13. And when Senator Pressler, the Chairman of the Senate Commerce Committee, said that he hoped the FCC would "wither away," Chairman Hundt responded that the most recent FCC auction had raised $4 million per FCC employee. *See* Wall St. J., March 17, 1995, at A1.

[3] For example, the Bureau erroneously read the FCC's decision in *USSB I* to deny an extension to a DBS permittee when, in fact, the FCC had *granted* the request. App. 86a & n.18. The full Commission was forced to acknowledge this glaring error. *Id.* at 28a n.54.

The Congressional Pressure Applied to the FCC to Auction Advanced's Spectrum. The International Bureau's decision—and the possibility that Advanced's spectrum might be available for auction—attracted considerable attention on Capitol Hill. Enticed by the hundreds of millions of dollars that auctioning Advanced's spectrum would add to federal coffers, Congress brought tremendous pressure to bear upon the FCC to do just that.

While Advanced's petition for review was pending before the full Commission, Congress held hearings to consider the FCC's future appropriations. At those hearings, at which all five Commission members appeared, Congress' strong preference for auctions was made clear. *See, e.g.*, Appropriation Hearings at 26. Jack Fields, the Chairman of the House Telecommunications and Finance Subcommittee, specifically criticized the FCC for allocating certain wireless cable licenses by lottery rather than auction and pointedly asked the three commissioners who had voted for a lottery to justify their decision—"[p]articularly in light of * * * the attitude of Congress toward * * * lotteries versus auctions." *Id.* at 27.

Even more notably, while the matter was still pending before the FCC, Senators McCain and Dorgan introduced an amendment to the 1996 appropriations bill covering the FCC that precluded the Commission from taking any action on Advanced's pending applications other than to auction the spectrum. *See* 141 Cong. Rec. S14513 (daily ed. Sept. 28, 1995). As Senator McCain explained, the amendment "would mandate that the FCC auction" Advanced's DBS spectrum. *Id.* The Senate adopted the McCain-Dorgan amendment by a vote of 98-0. *See id.* at S14586 (daily ed. Sept. 29, 1995). It never became law since, as shown below, soon after the vote the FCC did on its own what the amendment would have required.

The recorded floor debate on the amendment confirms, first, that the amendment was driven by Congress' desire to raise revenue. Senator McCain declared that "we must act in a manner that ensures this spectrum is sold for the

highest amount possible," *id.* at S14514, and an estimate that an auction of Advanced's spectrum would yield $300-$700 million was repeatedly bandied about.[4] After passage of the amendment, Senator Brown took to the floor "to congratulate Senator McCain for pursuing the laudable goal of maximizing revenues for the Treasury." *Id.* at S14692.

Second, the record reflects the amendment was intentionally designed to influence the Commission's action regarding Advanced. Senator McCain made no bones about it, saying that "the FCC is at a standstill regarding this issue. It is looking to the Congress for guidance." *Id.* at S14514.[5] Third, in the floor debate Senator McCain attributed the International Bureau's decision to Congress' efforts, expressing the view that "[t]he bureau felt compelled to use a new, tougher definition of due diligence due to the congressional mandate regarding spectrum auctions." *Id.*

MCI's Opening Bid and the Decision of the Full Commission. Lest there be any doubt about what would become available if Advanced's pending applications were denied, on October 10, 1995, the President of MCI Communications Corporation ("MCI") sent a letter to Chairman Hundt announcing that in an auction for Advanced's spectrum MCI "will submit an opening bid of $175

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[4] *See* 141 Cong. Rec. at S14513, S14515, S14516, S14573, S14586 (statements of Sen. McCain); *id.* at S14515 (statement of Sen. Gramm); *id.* at S14574, S14575, S14586 (statements of Sen. Dorgan). *See also id.* at S14575 (statement of Sen. Brown) ("I think all Members are aware that there is a great deal of money available in the disposition of this matter.").

[5] *See also id.* at S14516 (statement of Sen. McCain) (recognizing that the FCC had not made "a final ruling"). The Senate was aware of a report that the FCC was divided and undecided on the case. According to Senator Hollings, "[l]awyers call from both sides of this case. I understand, now, the vote is 2 to 2 at the FCC: Two members of the FCC disposed toward an auction, two disposed toward what they characterize as the recommendation of the staff * * *. There is one indecisive member." *Id.* at S14574.

million." C.A. App. 768. Six days later—less than three weeks after the Senate adopted the McCain-Dorgan amendment—the FCC by a 3-2 vote upheld the International Bureau's decision and announced that Advanced's spectrum would be auctioned. App. 14a.

A bare majority of the Commission acknowledged Advanced's many "laudable" contributions to the DBS industry, *id.* at 33a, but determined that Advanced did not meet the due diligence requirement because it had not launched DBS service within the time provided under its permit. *Id.* at 29a-46a. This rigid approach was warranted, it said, because the launch of service by DIRECTV in October 1994 had "ushered in [a] new era" in the DBS industry. *Id.* at 27a. The FCC canceled Advanced's permit and announced that it would institute a rulemaking to establish procedures for auctioning the newly-available spectrum. *Id.* at 15a. The Commission specifically noted that in such an auction "MCI has stated it would submit an opening bid of $175 million." *Id.* at 48a n.127.

Commissioners Andrew Barrett and James Quello dissented. Commissioner Barrett stated that it "seems entirely unreasonable, and, indeed, irresponsible, for the Commission to disregard its primary objective—to encourage competition amongst DBS providers in order to enhance consumer choice—by forestalling yet another viable and prepared DBS competitor from entering the marketplace in the immediate future." *Id.* at 65a. He added that he was "puzzled as to why the Bureau determined to apply a different set of criteria for ascertaining due diligence than were used for other permittees with respect to the launch of service" and that he did "not believe that ACC's efforts are patently distinguishable from the efforts made by those permittees in cases in which the Commission either granted an extension request or a transfer of control application." *Id.* at 66a.

Commissioner Quello stated that "[i]n its decision today, the majority has changed the DBS due diligence rules in the middle of the game, unlawfully and unfairly dis-

advantaging an innocent participant." *Id.* at 71a. Like Commissioner Barrett, he took the majority to task for "fundamentally misappl[ying] Commission precedent" and "set[ting] up a series of tenuous and tortured distinctions without any difference in claiming that Advanced's situation is markedly different from that of other permittees in cases with remarkably similar facts." *Id.* at 71a, 78a.

Events Subsequent to the FCC's Decision. On October 17, 1995—the day after the FCC's opinion was adopted and the day *before* it was officially released—Chairman Hundt granted an interview in which he spoke freely about the strong impression the Senate amendment mandating the auctioning of Advanced's spectrum had made upon him. Of the Senate's unanimous vote, the Chairman said "[n]inety-eight senators. I agree that it's not the law but it is a powerful expression of opinion." *Hundt Explains Call for Auction,* Satellite Business News, Oct. 25, 1995, at 1, 26 (transcript of interview).

On October 30, 1995, the FCC instituted a rulemaking proposing procedures for conducting DBS auctions. C.A. App. 106-161. Significantly, in that proceeding, Commissioner Barrett revealed on the record that "prior to rendering a decision in the *Advanced* [case], one of my colleagues asked me whether [MCI's $175 million] alleged opening bid would persuade me that auctioning ACC's channels was appropriate." *Id.* at 160 n.5.[6]

On December 15, 1995, the Commission issued an order authorizing an auction of the spectrum previously assigned to Advanced. *Id.* at 177-278. On January 24 and 26, 1996, Advanced's spectrum was auctioned off for nearly $735 million. MCI won the most valuable portion of the spectrum with a staggering bid of $682.5 million and EchoStar won the remainder with a bid of $52.3 million. *Id.* at 893-894.

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[6] MCI's $175 million opening bid is mentioned at least five other times in the rulemaking. C.A. App. 136 n.123, 137 n.129, 142, 143 n.147, 160 & n.4.

If it were not clear enough that money was the driving force behind the decision to reclaim Advanced's spectrum for auction, Chairman Hundt removed all doubt in a speech delivered shortly after the auction in which he candidly stated:

> [I]t wasn't really relevant that Rupert Murdoch [7] had to give me a king's ransom, an absolute fortune, a colossal sum, $682 million in an auction for the DBS satellite slot.
>
> The amount didn't matter at all.
>
> Who am I kidding?
>
> I can now reveal the truth about the auctions. Don't pass it on. We intended all along to raise in auctions of the airwaves more money than Bill Gates has.
>
> Last week we hit the target, and we're now at $15.8 billion with dozens of auctions yet to go. [Hundt, Speech to the Artists Rights Foundation, Feb. 15, 1996 (as prepared for delivery).[8]]

The Court of Appeals' Decision. The Court of Appeals upheld the FCC's decision. App. 1a-9a. Noting that its review was deferential, the court rejected Advanced's claims that the FCC (1) departed arbitrarily from its own precedents granting extensions to other DBS permittees and approving the for-profit sale of a permit, and (2) failed to provide a reasoned explanation for its decision, which delayed the initiation of new DBS service in contravention of the agency's previously articulated goals. *Id.* at 5a-9a. Finally, the court refused to discern any "illicit motivation on the part of the FCC," explaining that the

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[7] News Corporation, which is owned by Mr. Murdoch, is MCI's partner in its DBS venture. *See* Samuels, *Gore-ing Malone's Ox*, Forbes, Sept. 9, 1996, at 56.

[8] In considering this case, this Court may take the Chairman's public statements into account. *See Washington Ass'n for Television & Children* v. *FCC*, 712 F.2d 677, 683 n.12 (D.C. Cir. 1983); *Southern Louisiana Area Rate Cases* v. *Federal Power Comm'n*, 428 F.2d 407, 438 n.98 (5th Cir.) (taking judicial notice of speeches by FPC commissioners), *cert. denied*, 400 U.S. 950 (1970).

FCC's opinion "does not base its denial of ACC's renewal application on the expectation of [auction] revenues." *Id.* at 9a. The Court of Appeals having denied a timely petition for rehearing and suggestion for rehearing in banc, *id.* at 10a-11a, Advanced now seeks review of that court's judgment.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD CLARIFY THAT, CONTRARY TO THE VIEW OF THE COURT OF APPEALS, THE FACT THAT THE GOVERNMENT STANDS TO GAIN HUNDREDS OF MILLIONS OF DOLLARS IF AN AGENCY RECLAIMS ASSETS FOR AUCTION TRIGGERS HEIGHTENED JUDICIAL SCRUTINY OF THE DECISION TO DO SO.

In 1993, for the first time, Congress and the President gave the FCC the power to auction spectrum for profit. In the words of one commentator, this effected "one of the biggest changes in the history of United States regulation of the airwaves since the sinking of the Titanic led the federal government to seize control of the airwaves." Allard, *The New Spectrum Auction Law,* 18 Seton Hall Legis. J. 13, 54-55 (1993). This is no overstatement. Spectrum auctions have yielded over $15 billion, *see supra* at 12, and are already figuring prominently in the Nation's fiscal planning. *See* Shelton, *Why the Dole Plan Adds Up,* Wall St. J., Aug. 27, 1996, at A12 (reporting that President Clinton's economic plan calls for raising $44 billion in revenues from spectrum auctions and that presidential candidate Robert Dole's plan calls for raising $34 billion from auctions).

Congress recognized in the Communications Act the danger that the prospect of garnering revenue might sway the FCC from its proper mission. Thus, the Act provides that the FCC "may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding." 47 U.S.C. § 309 (j)(7)(A). The legislative history of

this provision reinforces the clear intent of the statutory language:

> The Committee intends the FCC to make its decisions based on sound communications policy pursuant to the Communications Act. *The Commission is not a collection agency of the U.S. Government, and should not be influenced by budgetary considerations.* This paragraph is designed to insulate the FCC's communications policy decisions from budgetary pressures, and clarifies that *important communications policy objectives should not be sacrificed in the interest of maximizing revenues from auctions.* [H.R. Rep. 103-111, 103d Cong., 1st Sess. 258 (1993) (emphasis added).]

Thus, the meaning of Section 309(j)(7)(A) is clear: the federal revenues that an auction might generate may not be a factor in the FCC's decision on a matter within its purview.[9]

In the court below, Advanced argued that it was necessary to subject the FCC's decision to heightened scrutiny, given the agency's interest in reclaiming Advanced's spectrum so that it would be available for auction. *See* Opening Br. 28-29; Reply Br. 3, 7-8; Pet. for Reh'g 8-11 & n.2. The Court of Appeals disagreed, stating that "[o]ur review of the Commission's decision is deferential" and that it would apply a "strong presumption of agency regularity." App. 5a, 9a (quotation marks omitted). The Court of Appeals erred in treating this case like any run-of-the-mill agency adjudication.

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[9] It is clear that, to violate Section 309(j)(7)(A), the expectation of revenues need only be *a* factor, not the only or the major factor, in the FCC's decision. The very next subsection of the Act, Section 309(j)(7)(B), provides that in issuing auction-related regulations the FCC may not base its decision "solely or predominantly on the expectation of Federal revenues." Because the "solely or predominantly" language is missing from Section 309(j)(7)(A), that provision should be read more broadly to prohibit *all* consideration of revenues by the FCC. The headings of the two subsections confirm this reading. *Compare* § 309(j)(7)(A) ("Consideration prohibited") *with* § 309(j)(7)(B) ("Consideration limited").

A. Compliance With Section 309(j)(7)(A) Is Necessary For The FCC's Auction Authority To Comport With Due Process.

The Due Process Clause long ago came to mean that a government decisionmaker cannot have a pecuniary interest in the outcome of his own decisions. "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). "This applies to administrative agencies which adjudicate as well as to courts," *Withrow*, 421 U.S. at 46, and to any "depriv[ation] of a protected interest, whether in a criminal or civil setting." *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993).

For a decisionmaker to have a financial stake in one of his own decisions is a textbook case of unconstitutional bias:

> [V]arious situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome * * *. [*Withrow*, 421 U.S. at 47 (footnote omitted).]

This Court's precedents establish, moreover, that this constitutional principle is not limited to cases in which the decisionmaker stands to profit personally, but also applies where officials have an interest in raising revenues for their employer, the government. *See Tumey* v. *Ohio*, 273 U.S. 510 (1927); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238 (1980).

In *Tumey* this Court held that it violated due process for a village mayor to adjudicate prohibition violations where his village received a portion of the fines he imposed. For a unanimous Court, Chief Justice Taft stated

that the test is whether there would be "a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused." *Tumey*, 273 U.S. at 532.[10]

Building on *Tumey*, this Court held in *Ward* that a mayor's adjudication of traffic offenses, the revenues from which contributed to his village's finances, violated due process. The Court explained that the mayor faced a "possible temptation" to raise money for the village which "may make him partisan." 409 U.S. at 60. That situation, the Court said, "necessarily involves a lack of due process of law." *Id.* (quoting *Tumey*, 273 U.S. at 534). Notably, the Court reached this decision notwithstanding the dissent's observation that "[t]he Ohio mayor who judged this case had no direct financial stake in its outcome." *Id.* at 62 (White, J., dissenting).

Ward and *Tumey* thus stand for the proposition that for a government decisionmaker to have an impermissible pecuniary interest in a case, he need not stand to profit directly from his decision. *Accord Marshall*, 446 U.S. at 242-243, 250 (reaffirming *Ward* and *Tumey* and stating that unconstitutional bias can derive from "the prospect of *institutional* gain") (emphasis added).

It is clear under these cases that the FCC has a direct financial stake in auctioning spectrum. Because the FCC is entitled to recover the cost it incurs in conducting spectrum auctions, *see supra* note 1, it profits from auctions in the sense that, were it to allocate the spectrum by other means, the cost would come out of its budget. Allo-

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[10] The mayor's salary in *Tumey* was supplemented by the fees and costs levied by him but the Court made clear that this "is not the only reason for holding that due process of law is denied to the defendant here." *Tumey*, 273 U.S. at 532. *See Ward*, 409 U.S. at 60 ("The fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle."); *Marshall*, 446 U.S. at 242-243.

cating spectrum by auction thus allows the FCC to devote more of its budget to other ends. The money involved is substantial. *See* Stern, *Hundt Calls Budget Slash "Mistake"*, Broadcasting & Cable, Sept. 11, 1995, at 13 (noting that the FCC will recover most of its $20 million in auction-related administrative costs).

Beyond this, the FCC has a powerful institutional interest in generating auction revenues. Large bureaucracies (and the bureaucrats who populate them) have an interest in pleasing the legislators who control their budgets and hence their power, prestige, and influence. The FCC is no different. Spectrum auctions can produce billions of dollars in federal revenues and Congress—which has its own institutional interest in maximizing the funds available for spending without raising taxes or adding to the budget deficit—knows this. Thus, it should come as no surprise that Congress has pressured the FCC to hold auctions and that the FCC has trumpeted the revenues its auctions have generated when congressional budget cutters whetted their knives. *See supra* at 6-7. The great importance with which the FCC views auction revenues is reflected in the comments of its current Chairman, who seemingly passes up no opportunity to boast of the billions of dollars auctions have produced. *See supra* at 7, 12.[11] In sum, it can fairly be said that FCC officials—when confronted with a decision whether to reclaim spectrum for auction—are in a situation "which would offer a possible temptation to the average man as a judge * * * which might lead him not to hold the balance nice, clear and true." *Ward*, 409 U.S. at 60 (quoting *Tumey*, 273 U.S. at 532). The "institutional gain" (*Marshall*, 446 U.S. at 250) that the FCC derives from auctions is undeniable, and the enormous financial stakes at issue here simply dwarf those found to create an unconstitutional risk of bias in *Tumey* and *Ward*.

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[11] As noted, Chairman Hundt has proposed funding the FCC entirely with auction revenues. *See supra* at 7. The viability of that proposal, of course, depends upon the FCC's ability to produce sufficient auction revenues.

B. Heightened Scrutiny Of The FCC's Decisions To Reclaim Spectrum For Auction Is Necessary To Avoid A Serious Constitutional Question.

As this Court has said, it "makes sense to scrutinize governmental action more closely when the State stands to benefit." *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 56 (1993) (quoting *Harmelin* v. *Michigan*, 501 U.S. 957, 978 n.9 (1991) (opinion of Scalia, J.)).[12] And it makes even more sense where, as here, Congress—acting out of eagerness for auction revenues—applied intense pressure to the FCC to decide a pending case in a manner that would make the spectrum at issue available for auction. *See ATX, Inc.* v. *United States Dep't of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994) (substantial congressional pressure on agency to reach certain decision "warrant[s] close examination"). But not only does heightened scrutiny in this case make sense in light of the congressional and financial pressures involved, it was against just such pressures that Section 309(j)(7)(A) was designed to guard. Accordingly, applying heightened scrutiny is fully consistent with the Communications Act.

This Court's recent decision in *Concrete Pipe* establishes that where there is a danger that an initial decisionmaker is biased, due process requires nondeferential review of its decision. *Concrete Pipe* involved a challenge to the procedures by which liability is assessed for employers withdrawing from a multiemployer pension plan. Under federal pension law, the sponsor of such a plan calculates an exiting employer's "withdrawal liability" following which, if a settlement is not reached, the matter is referred to arbitration. At issue in *Concrete Pipe* was a statute providing that in such an arbitration the plan sponsor's determination is "presumed correct" absent a

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[12] *See also United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 26 (1977) ("[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate [where] the State's [financial] self-interest is at stake").

sufficient showing by the employer. The employer contended that because a plan sponsor necessarily would be biased in its initial assessment of withdrawal liability, the presumption applicable in a subsequent arbitration denied the employer the constitutional right to an impartial adjudicator. *Concrete Pipe*, 508 U.S. at 609-615.

The critical issue was the showing the employer had to make in arbitration to rebut the presumption favoring the plan sponsor (which the Court assumed to be biased). Applying the canon that statutes should be construed to avoid serious constitutional problems, the Court read the statute to "permit[] adjudication of the facts by the arbitrator without affording deference to the plan sponsor's determinations." *Id.* at 626. "[R]equiring a showing that * * * would grant the plan sponsor's factual findings a great deal of deference," the Court said, would present "a substantial question of procedural fairness under the Due Process Clause." *Id.* at 625, 626.

Under *Concrete Pipe*, the Court of Appeals erred in reviewing the reasons supplied by the FCC for its decision in this case "deferential[ly]" and with a "strong presumption of agency regularity." App. 5a, 9a. As shown above, there is a serious risk that the $735 million auctioning Advanced's spectrum predictably generated distorted the FCC's decisionmaking in violation of Advanced's right to due process. Therefore, to avoid a serious constitutional question—as in *Concrete Pipe*—Advanced is entitled to a review of the FCC's decision that does not simply replicate the Commission's potential bias by affording the decision deference.

The Court of Appeals' deferential review of the FCC's decision conflicts on a fundamental level with many decisions of this Court and other courts recognizing, in a wide variety of legal contexts, that heightened scrutiny is appropriate when the government has a financial stake in the action under review.

Under the Contracts Clause, courts reviewing a State's impairment of contracts between private parties "properly

defer to legislative judgment as to the necessity and reasonableness of a particular measure." *United States Trust Co.* v. *New Jersey*, 431 U.S. at 23. But when a State impairs one of its own contracts such deference "is not appropriate because the State's self-interest is at stake." *Id.* at 26. There is, in short, "heightened Contract Clause scrutiny when States abrogate their own contractual obligations." *United States* v. *Winstar Corp.*, 116 S. Ct. 2432, 2455 (1996) (plurality opinion).[13] A "dual standard of review" also applies under the Fifth Amendment to the Federal Government's impairment of contractual obligations. *United States Trust Co.*, 431 U.S. at 26 n.25. *See Perry* v. *United States*, 294 U.S. 330, 350-351 (1935).[14]

Under well-established Commerce Clause jurisprudence, courts give greater scrutiny to laws designed to favor a State's economic self-interest than to those that are even-handed in their treatment of in-state and out-of-state interests. *See, e.g., Oregon Waste Systems, Inc.* v. *Depart-*

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[13] *See also Winstar Corp.*, 116 S. Ct. at 2466 n.41 (opinion of Souter, J.) ("Our Contract Clause cases have demonstrated a * * * concern with governmental self-interest"); *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 244 n.15 (1978) ("impairments of a State's own contracts * * * face more stringent examination under the Contract Clause"); *Association of Surrogates & Supreme Court Reporters* v. *New York*, 940 F.2d 766, 771 (2d Cir. 1991) ("when the state's legislation is self-serving and impairs the obligations of *its own* contracts * * * a more searching analysis under the contract clause is appropriate") (emphasis in original).

[14] Just last Term in *Winstar Corp.*, this Court upheld the liability of the United States for breach of contract arising from Congress' enactment of legislation that had the effect of repudiating its contractual obligation. Rejecting the Government's defense based on the sovereign acts doctrine, Justice Souter observed that "some line has to be drawn * * * between regulatory legislation that is relatively free of government self-interest * * * and, on the other hand, statutes tainted by a governmental object of self-interest." 116 S. Ct. at 2465. "The greater the Government's self-interest," he added, "the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence." *Id.* at 2466.

ment of Environmental Quality, 114 S. Ct. 1345, 1350 (1994); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978). In holding that due process requires notice and an opportunity for a hearing in civil forfeiture cases, this Court emphasized that a hearing "is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding." *James Daniel Good*, 510 U.S. at 55-56. And in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989), the Court held that the Excessive Fines Clause does not apply to punitive damages awards in cases between private parties, but noted that it would be a different case if the government had "used the civil courts to extract large payments or forfeitures for the purpose of raising revenue."

In many other contexts as well the recognition of the government's pecuniary interest has affected a court's standard of review. *See United States* v. *Real Property Located in El Dorado County*, 59 F.3d 974, 984 (9th Cir. 1995) ("All assets seized by the Department of Justice go into its Asset Forfeiture Fund, which the Attorney General is authorized to use for law enforcement purposes. This incentive enhances the need for close scrutiny of *in rem* forfeitures.") (citation omitted); *Coalition to End the Permanent Congress* v. *Runyon*, 979 F.2d 219, 225 (D.C. Cir. 1992) (opinion of Silberman, J.) ("It seems to me that a statute that provides a subsidy to incumbents directly in contemplation of an election * * * must be subject to heightened scrutiny.") (emphasis omitted); *Massachusetts* v. *Secretary of HHS*, 749 F.2d 89, 96 (1st Cir. 1984) ("the Secretary's obvious pecuniary stake in this case is bound to heighten our scrutiny of her reading of the statute"), *cert. denied*, 472 U.S. 1017 (1985).[15]

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[15] Similar holdings can be found in the context of private decisions infected by pecuniary interest. *See Atwood* v. *Newmont Gold Co.*, 45 F.3d 1317, 1322 (9th Cir. 1995) ("[W]e apply 'heightened scrutiny' [under ERISA] where the plan administrator has a conflict of interest by virtue of its economic stake in the benefit deci-

C. When Reviewed Without Improper Deference, The FCC's Decision Is Unlikely To Withstand Judicial Scrutiny.

In the Court of Appeals, Advanced argued that the FCC departed from its precedents and policies in denying Advanced's extension request—the first and so far only time the agency has taken such action. *See* Opening Br. 27-46; Reply Br. 12-27; Pet. for Reh'g 12-15. Specifically, Advanced argued that this case was materially indistinguishable from others in which the FCC granted extensions (and second extensions) to DBS permittees, and that the FCC's decision in this case contravened the agency's settled policy of facilitating the prompt initiation of DBS service. For present purposes, the fine points of Advanced's argument are not important. What is important is that without the "deferential" standard of review and "presumption" of regularity that the Court of Appeals employed, App. 5a, 9a, the explanation tendered by the FCC majority for its decision likely would not have passed muster. Indeed, two of the five Commissioners—who, unlike the Court of Appeals, gave no deference to the majority's reasoning—filed compelling dissents. *Id.* at 64a-78a.

Far from examining the reasons given by the FCC for its unprecedented decision to deny Advanced's extension request "more closely," *James Daniel Good*, 510 U.S. at 56, the court below went to the other extreme, concluding that the agency action was not affected by the prospect of auction revenues because the agency did not boldly admit on the record that it was. It is to that related error that we now turn.

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sions which it makes."); *In re Fine Paper Antitrust Litig.*, 840 F.2d 188, 195-196 (3d Cir. 1988) ("In fund in court cases, * * * where there is a conflict of interest between fee applicants and class members interested in the ultimate distribution, heightened judicial scrutiny is required.").

II. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE $735 MILLION IN REVENUES YIELDED BY THE AUCTION OF PETITIONER'S SPECTRUM PLAYED NO PART IN THE FCC'S DECISION IN THIS CASE.

The Court of Appeals rested its conclusion that the FCC's decision to deny Advanced an extension was not based on the expectation of revenues solely on the fact that "*the Order* does not base its denial of ACC's renewal application on the expectation of such revenues." App. 9a (emphasis added). The court added that it was "unwilling" to attribute to the FCC a motivation not reflected in "the text of the Order." *Id.*

The Court of Appeals' myopic approach to this case cannot be correct. To find that an FCC decision was impermissibly based on the expectation of revenues only where the Commission expressly announces that it was ignores the purpose of Section 309(j)(7)(A) and makes that law meaningless.

When Advanced's extension request came before the Commission, the Commission was faced with a stark choice: grant the request, as it had in every other such case to come before it, and secure the initiation of DBS service at Advanced's spectrum locations within a few months—or, for the first time ever, deny the request, free up the spectrum for auction pursuant to the newly-obtained auction authority, and realize hundreds of millions of dollars for the Federal Treasury. The notion that the prospect of such revenues played *no role* in the Commission's consideration of Advanced's extension request is palpably implausible and, in any event, refuted by the record. *See* App. 48a n.127.

The Court of Appeals' reluctance to look beyond the FCC's formal explanation for its decision is not justified by this Court's cases. This Court has "routinely inquired into the motivation underlying executive or administrative decisions in a variety of contexts." Tribe, American Constitutional Law § 12-5, at 814-815 (2d ed. 1988)

(footnote omitted). In such cases, this Court has created a mode of analysis for determining whether a governmental decision was based on legally prohibited factors, improper motive, or other impermissible considerations. *See, e.g., Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266-268 (1977); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 540 (1993) (opinion of Kennedy, J.).

Determining the basis for an agency's decision "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. The factors relevant to the analysis include (1) the impact of the decision at issue; (2) the historical background of the decision; (3) the specific sequence of events leading up to the decision; and (4) the legislative or administrative history of the decision, including contemporary statements by members of the decisionmaking body. *Id.* at 266-268; *Lukumi Babalu Aye*, 508 U.S. at 540. All four of these factors—plus a fifth one—point to the conclusion that the FCC's expectation of revenues was a motivating factor causing the agency to reclaim Advanced's spectrum for auction.

Impact of the decision. Denying Advanced's applications permitted the FCC to auction Advanced's spectrum, collecting the tidy sum of $735 million. The fact that the impact of the FCC's decision was the addition of $735 million to the Treasury lends support to the view that the FCC was motivated, at least in part, by the expectation that its action would have that very effect. *See Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 n.24 (1979) ("What a legislature or any official entity is 'up to' may be plain from the results its actions achieve").

Historical background. The backdrop to this case further fuels the suspicion that revenue was the reason Advanced lost its DBS spectrum. Since the Commission acquired auction authority, Chairman Hundt has made much of the FCC's contributions to the national fisc. In

public statements, he has proudly proclaimed that "FCC stands for Federal Cash Cow," that his agency is the "Federal Auction Commission," and that the Commission is "the goose that lays the golden eggs." And he has cited the billions of dollars in FCC auction revenues to defend the Commission's budget from those on Capitol Hill who would slash it. *See supra* at 6-7. In short, the FCC's decision in this case cannot be viewed except in the context of an agency with a powerful political and institutional incentive to maximize auction revenues.

Events leading up to the decision. As this Court has explained, policy reversals, departures from normal procedures, and the disregard of "factors usually considered important by the decisionmaker [that] strongly favor a decision contrary to the one reached" call into question the decisionmaker's motive. *Arlington Heights*, 429 U.S. at 267.

Prior to this case, the FCC had *never* denied a DBS permittee's request for an extension of time, even when the requesting permittee was seeking a second extension. After ruling against Advanced, the Commission continued to dole out extensions, without exception, to all comers.[16] Furthermore, in *USSB II*, *Dominion Satellite*, and *Directsat*, the FCC approved applications virtually identical to those of Advanced that the Commission denied here. *See supra* at 4-5. Finally, by denying Advanced's applications—which would have resulted in the initiation of service in April 1996—the FCC ignored its settled policy of facilitating prompt delivery of DBS to the public. *See supra* at 4. In light of the above, Commissioner Quello was quite right to comment that the majority "changed the DBS due diligence rules in the middle of the game,

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[16] *See Echostar Satellite Corp.*, 11 FCC Rcd 3017 (Int'l Bur. 1996); *Directsat Corp.*, 11 FCC Rcd 1775 (Int'l Bur. 1996); *Direct Broadcasting Satellite Corp.*, DA 95-2439 (Int'l Bur. rel. Dec. 8, 1995); *Continental Satellite Corp.*, 11 FCC Rcd 1157 (Int'l Bur. 1995).

unlawfully and unfairly disadvantaging" Advanced. App. 71a. In sum, there is much here "about the sequence of events leading up to the decision that would spark suspicion." *Arlington Heights*, 429 U.S. at 269.

Administrative history. The official proceedings in this case provide still further evidence that the FCC impermissibly considered revenues in reaching its decision. The FCC's own Opinion and Order makes explicit reference to the large sums to be gained by auctioning Advanced's spectrum. *See* App. 48a n.127 (noting MCI's opening bid of $175 million for Advanced's spectrum). As the Court of Appeals said, "the Commission was aware that substantial sums could be realized from the sale of any orbital slots and channels recovered from ACC." *Id.* at 9a. Furthermore, Commissioner Barrett indicated *on the record* in the companion proceeding to establish auction procedures that, prior to rendering a decision in the Advanced case, a colleague asked him whether MCI's multimillion dollar bid "would persuade me that auctioning ACC's channels was appropriate." C.A. App. 160 n.5. Finally, Chairman Hundt in a public address delivered shortly after the auction of Advanced's spectrum stated that the $682 million that MCI and its partner paid for the lion's share of Advanced's spectrum—what he called without exaggeration "a king's ransom, an absolute fortune, a colossal sum"—"wasn't really relevant" and "didn't matter at all." He quickly added, however, "[w]ho am I kidding? * * * We intended all along to raise in auctions of the airwaves more money than Bill Gates has." *See supra* at 12.

Congressional pressure on the FCC. There is a fifth factor strongly indicating that anticipated federal revenues played a role in the FCC's decision. In this case there was intense congressional pressure on the FCC to auction Advanced's spectrum to raise revenue. That pressure took the form most significantly of a 98-0 Senate vote passing legislation *requiring* the FCC to auction Advanced's spectrum by denying funds to take any other

action, sending a message the FCC Chairman confirmed he received, loud and clear. *See supra* at 8, 11. The avowed purpose of the Senate's action was to raise revenue and influence the FCC's decision in this case. *See supra* at 8-9. Finally, the FCC's decision also came at a time when Congress was considering and holding hearings on the Commission's budget. *See supra* at 8. There can be little doubt that the outcome of this case was influenced by "having Congress intervene in the middle of the adjudicatory action by the FCC." 141 Cong. Rec. S14575 (statement of Sen. Brown).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed May 6, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1551

ADVANCED COMMUNICATIONS CORPORATION, *et al.*,
Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Intervenors

Consolidated with Nos. 95-1560 and 95-1561

Appeals from an Order of the
Federal Communications Commission

Before BUCKLEY, WILLIAMS and HENDERSON, *Circuit Judges*

JUDGMENT

These appeals were considered on the record from the Federal Communications Commission and on the briefs and oral arguments of the parties. The issues have been accorded full consideration by the court and occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). For the reasons stated in the attached memorandum, it is

ORDERED AND ADJUDGED that the decision of the Federal Communications Commission be affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

PER CURIAM

FOR THE COURT:

/s/ Mark J. Langer
MARK J. LANGER
Clerk

Attachment

MEMORANDUM

I.

In 1984, the Federal Communications Commission ("FCC" or "Commission") awarded Advanced Communications Corporation ("ACC") a conditional construction permit to provide direct broadcast satellite ("DBS") service. Under the Commission's DBS rules, a permittee must satisfy two due diligence requirements: First, it must "begin construction or complete contracting for construction of [its satellite system] within one year of the grant of the construction permit"; and second, it must begin operating its system "within six years of the construction permit grant." 47 C.F.R. § 100.19(b). These requirements were designed, *inter alia*, to ensure the prompt use of DBS spectrum resources.

ACC fulfilled the first due diligence requirement, and in 1986 it was awarded orbital slots and channels. ACC failed to meet the second requirement, however, and requested a four-year extension, which the Commission granted in *Advanced Communications Corp.*, 6 FCC Rcd 2269, 2274 (1991).

During this extension period, ACC entered into negotiations with another DBS permittee, Echostar Satellite Corporation ("EchoStar"), to form a joint venture for the provision of DBS service. After several years of negotiations, however, the proposal was abandoned. Shortly before the expiration of the extension, ACC entered into an arrangement with Tele-Communications, Inc. ("TCI") and TCI's subsidiary, Tempo DBS, Inc. ("Tempo"), that took two alternative forms. Under the first, ACC would, subject to FCC approval, simply transfer its DBS permit to Tempo in a for-profit sale. In the alternative, under a so-called Capacity Purchase Agreement ("CPA"), TCI would provide two of its satellites "for ACC's use" and would issue to ACC shares of TCI stock worth approximately $45 million, in exchange for which ACC would

permanently convey "all of the transponder capacity" of the two satellites back to TCI. The agreement called for ACC's ultimate dissolution and the distribution of the TCI stock to ACC's sole shareholder. Under either arrangement, the satellite transponder capacity would be made available to Primestar Partners, L.P. ("Primestar"), an affiliate of TCI.

In August 1994, ACC requested an additional four-year extension within which to construct and launch its DBS system. It also requested permission to assign its permit to Tempo. On April 26, 1995, the FCC's International Bureau denied the request for a second extension, finding that it would not serve the public interest. *Advanced Communications Corp.*, 77 Rad. Reg. 2d (P&F) 1160 at ¶ 19 (Int'l Bur. 1995) ("*Bureau Order*"). The Bureau declared ACC's permit "null and void" and dismissed the company's assignment application as moot. *Id.* at ¶ 21.

The Bureau's decision was affirmed by the full Commission in an opinion and order adopted October 16, 1995. *Advanced Communications Corp.*, FCC 95-428 (rel. Oct. 18, 1995) ("*Advanced II*" or "Order"). The Commission agreed with the Bureau that "ACC had made little progress in construction, launch, and initiation of a DBS system in the past decade—particularly during its four-year extension—and therefore that an [additional] extension was not justified." *Id.* at ¶ 28 (citing *Bureau Order* at ¶¶ 13-20). It further explained that "ACC's lack of due diligence ha[d] resulted in a warehousing of spectrum from which it [sought] to profit." *Id.* at ¶ 64. Accordingly, the FCC canceled ACC's construction permit and reclaimed its orbital slots and channel assignments. The FCC subsequently auctioned the reclaimed spectrum for hundreds of millions of dollars.

ACC, Tempo, and Primestar ("Appellants") seek review of the Order, asserting a number of claims of which only the following warrant analysis: (1) the decision con-

stituted an arbitrary departure from agency precedent; (2) the FCC failed to provide a reasoned explanation for its decision, which would delay the initiation of new DBS service in contravention of the agency's stated goals; and (3) in deciding whether to grant ACC's extension request, the FCC improperly considered the revenues to be gained from the auction of ACC's orbital slots and channels.

II.

Our review of the Commission's decision is deferential; we will affirm "unless the agency's order was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1388 (D.C. Cir. 1995) (quoting 5 U.S.C. § 706(2)(A)).

With this standard in mind, we turn to appellants' contention that the Commission's revocation of its construction permit was an arbitrary departure from settled Commission precedents and policies. Appellants point to ACC's promotional activities in advancing the development of DBS and contend that ACC's efforts to satisfy its permit requirements were no less diligent than those of other DBS permittees whose extension requests had been granted, and that the FCC failed to explain how ACC's performance differed in any relevant respect from that of the permittees in those other cases.

It is elementary that an agency must apply its rules with consistency and may not depart from precedent without a reasoned explanation. *See Channel 51 of San Diego, Inc. v. FCC*, No. 95-1128, 1996 WL 139413 at *4 (D.C. Cir. Mar. 29, 1996) ("an agency must conform to its prior decisions or explain the reason for its departure from such precedent") (quoting *Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C. Cir. 1995)). We are not persuaded, however, that the Order departed from precedent. Although this was the first instance in which the FCC "denied an extension of time to a DBS permittee for fail-

ure to progress toward compliance with the second due diligence requirement," *see Advanced II* at ¶ 26 (emphasis deleted), in reaching that decision the Commission does not appear to have applied its principles in a manner inconsistent with its precedent.

In the Order, the FCC explained that "[w]hile promotional efforts may be laudable, those efforts are not an adequate substitute for the concrete progress toward the construction and operation of a DBS system. . . ." *Id.* at ¶ 31. This statement is consistent with the Commission's prior decisions, *see, e.g., United States Satellite Broadcasting Co.*, 7 FCC Rcd 7247 at ¶ 17 (1992) (*"USSB II"*) (noting that the "efforts made by USSB to establish its DBS system 'reveal[] no lack of capability or commitment' ") (quoting *United States Satellite Broadcasting Co.*, 3 FCC Rcd 6858, 6860 (1988) (*"USSB I"*)); and we find no error in the Commission's conclusion that ACC had failed to demonstrate the required "concrete progress." The only efforts to develop a DBS system during the first extension period that appellants were able to cite were ACC's failed negotiations with EchoStar and its successful negotiation of the CPA. *See* Brief for Appellants at 9-12. The joint venture with EchoStar never came to fruition, and we cannot say that the Commission abused its discretion in failing to credit ACC with the DBS system to be contributed by TCI under the CPA. *See Advanced II* at ¶ 39 ("the CPA cannot fairly be characterized . . . as an arrangement by ACC for the launch, deployment, and operation *of its own* satellite system") (emphasis added). It is readily apparent that ACC's only real contribution to the CPA was its DBS permit and that it would have a trivial involvement, if any at all, with the resulting system.

We reject appellants' contention that the decision in the Order is irreconcilable with other decisions in which the Commission has either granted an extension or allowed a transfer of control. To the contrary, the Commission has

articulated sufficiently principled distinctions from these other cases to withstand review. The Order is not inconsistent with *USSB II* (granting second extension and permitting modification of DBS permit to allow use of a satellite) and *Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680 (1993) (granting second time extension), *recons. den.*, FCC 95-421 (Oct. 5, 1995) ("*Dominion*"). In each of those cases, the DBS permittee had made significantly greater progress in developing its own DBS system than had ACC. *See Advanced II* at ¶ 49 (permittee in *USSB II* had "spent more than $23 million for a portion of a satellite . . . ; arranged to finance the remaining completion and launch costs of the satellite; and . . . executed contracts with various suppliers of DBS home receiving systems"); *id.* at ¶ 25 (permittee in *Dominion* "had developed a financing program, contracted for home receiving equipment, and obtained a contract for launch services").

Directsat Corporation, 10 FCC Rcd 88 (1995), presents a more difficult case. In that decision, the Commission approved the for-profit sale of the permittee's construction permit for an unbuilt DBS system. In the Order, the Commission distinguished *Directsat* on the ground that "unlike ACC, Directsat did not request an extension of its DBS construction permit," *Advanced II* at ¶ 56 (emphasis deleted), and that whereas "Directsat's investment in the development of its DBS system had been substantial, and its progress toward actual implementation had been steady and consistent with the schedule established in its construction contract . . . . [,] ACC has consistently delayed the schedule established in its construction contract," *id.* (internal quotations omitted) (emphasis deleted).

Although we fail to see the relevance of the first distinction, *see* Dissenting Statement of Commissioner James H. Quello at 4, reprinted in Joint Appendix at 46 (it was apparent at the time Directsat filed its transfer application that an extension would be required; and an extension was,

in fact, later requested), we find the second both relevant and persuasive. One of the primary purposes of the due diligence rules is to prevent the "warehousing" of spectrum. *See Directsat,* 10 FCC Rcd at 89 ¶ 4 (due diligence rules "deter permittees from seeking to delay or postpone construction with the expectation that the permit would . . . become more valuable and could be sold at an increased price for profit"). The Commission may reasonably conclude that a permittee that makes steady and consistent progress towards the construction of its DBS system is less likely to be "warehousing" its spectrum than one whose progress is, at best, irregular. Directsat met its construction schedule while ACC regularly missed its promised construction deadlines and payments to its satellite contractor.

Next, we reject appellants' claim that the Order should be vacated because the Commission "failed to supply a reasoned explanation for its abrupt departure from [the Commission's] stated goal of ensuring the prompt initiation of DBS service." Brief for Appellants at 43. While the timely initiation of such service is one of the Commission's primary goals, that has never been the sole criterion used to determine whether an extension should be granted to a DBS permittee. Rather, the Commission has considered "[t]he totality of the circumstances—those efforts made and those not made, the difficulties encountered and those overcome, the rights of all parties, *and* the ultimate goal of service to the public." *USSB II,* 7 FCC Rcd. at 7249, ¶ 15 (quoting *USSB I,* 3 FCC Rcd at 6859) (emphasis added). Although enforcement of the due diligence rules may cause delays in the provision of a particular DBS system, the Commission's anti-warehousing policy relies on the enforcement of its due diligence obligations; otherwise, it could not ensure the prompt delivery of DBS service as a general matter. Taken to its logical conclusion, appellants' argument would deny the FCC the ability to revoke a DBS permit irrespective of the permittee's lack of due diligence if the

revocation would delay the provision of a given DBS service. Such a result is patently untenable.

Finally, we address appellants' contention that the FCC violated 47 U.S.C. § 309(j)(7)(A) by allowing the "expectation of Federal revenues [to play] a large role in [the] decision to deny [ACC's] application." Brief for Appellants at 24 (internal quotations omitted). While the Commission was aware that substantial sums could be realized from the sale of any orbital slots and channels recovered from ACC, *see Advanced II* at ¶ 67 n.127 (acknowledging the pledge by MCI to open bidding at $175 million in the event an auction were held), the Order does not base its denial of ACC's renewal application on the expectation of such revenues. Rather, the Commission's decision was predicated on ACC's failure to achieve "any concrete progress toward the actual construction and operation of its DBS system" during its first extension period. *Id.* at ¶ 37. Appellants are thus asking us to search beyond the text of the Order to find some alleged illicit motivation on the part of the FCC. This we are unwilling to do. "Agency opinions, like judicial opinions, speak for themselves," *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994); and appellants have pointed to nothing in the record that is sufficient to overcome the "strong presumption of agency regularity." *Louisiana Ass'n of Indep. Producers v. FERC*, 958 F.2d 1101, 1111 (D.C. Cir. 1992). Of course, we express no opinion as to whether the Commission was in fact barred by law from taking into account the expected impact on federal revenues.

APPENDIX B

[Filed Jun. 27, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1551

ADVANCED COMMUNICATIONS CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Intervenors

Consolidated with 95-1560, 95-1561

BEFORE: Buckley, Williams and Henderson, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed June 6, 1996, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

[Filed Jun. 27, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1551

ADVANCED COMMUNICATIONS CORPORATION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Intervenors

Consolidated with 95-1560, 95-1561

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of Appellant's Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Tatel did not participate in this order.

APPENDIX C

FCC 95-428

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF
ADVANCED COMMUNICATIONS CORPORATION

File Nos. DBS-94-11EXT

APPLICATION FOR EXTENSION OF TIME TO CONSTRUCT, LAUNCH, AND OPERATE A DIRECT BROADCAST SATELLITE SYSTEM

DBS-94-15ACP

APPLICATION FOR CONSENT TO ASSIGN DIRECT BROADCAST SATELLITE CONSTRUCTION PERMIT FROM ADVANCED COMMUNICATIONS CORPORATION TO TEMPO DBS, INC.

DBS-94-16MP

APPLICATION FOR MODIFICATION OF DIRECT BROADCAST SATELLITE SERVICE CONSTRUCTION PERMIT

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 1995 Released: October 18, 1995

By the Commission: Commissioners Quello and Barrett dissenting and issuing separate statements; Commissioners Ness and Chong issuing separate statements.

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I. INTRODUCTION

1. Before us are several Applications for Review of a Memorandum Opinion and Order issued by the International Bureau that: (1) denied Advanced Communications Corporation ("ACC") an extension of time in which to construct, launch, and operate its Direct Broadcast Satellite ("DBS") system; and (2) dismissed as moot ACC's applications for consent to assign its DBS construction permit to Tempo DBS, Inc. and to modify its permit to conform to the specifications of satellites currently under construction for Tempo Satellite, Inc.[1] Tempo Satellite is an affiliate of Tempo DBS and a current DBS permittee; both Tempo Satellite and Tempo DBS are wholly owned by Tele-Communications, Inc. ("TCI"), the country's largest cable multiple systems operator ("MSO"). These Applications for Review have been opposed by a number of parties, including most other DBS permittees.

2. We affirm the International Bureau's finding that ACC failed to meet its due diligence obligation of proceeding expeditiously with construction and launch of its DBS system. In 1984, the Commission assigned to ACC scarce public resources—orbital positions and channels—at no cost, requiring only that ACC proceed with due diligence to provide the DBS service it had promised. As the Bureau found, after more than a decade, including one four-year extension of time, ACC has not met the Commission's due diligence standards. Accordingly, we affirm the Bureau's decision to cancel ACC's construction permit. Because we deny the extension requested by ACC, its assignment and modification applications have been rendered moot, and thus will be dismissed. The channels and orbital locations previously assigned to ACC will therefore revert to the public for reassignment.

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[1] *Advanced Communications Corp.*, 77 Rad. Reg. 2d (P&F) 1160 (DA 95-944, April 27, 1995) ("*Bureau Order*").

3. With this decision, we also announce that before the end of this month we will initiate a rulemaking to establish a new methodology for reassigning DBS channels and orbital positions that become available as a result of either cancellation by the Commission or surrender by permittees. Our thinking at this point is that opening a window for new applications for DBS authorizations for these channels (and orbital positions), and then deciding among mutually exclusive applications by auction, will best serve the public interest. Since one of our primary goals is to expedite the provision of additional DBS service in order to foster competition both among DBS providers and between DBS and cable, we intend to meet the following timetable:

October 27, 1995	Notice of Proposed Rulemaking issued
December 12, 1995	Final Report & Order issued
January 17, 1996	New rules become effective
January 18, 1996	Channels reassigned; if competitive bidding chosen, auction begun and completed in one day

This is an ambitious timetable, but we are committed to achieving an expedited reassignment in order to minimize or avoid altogether any disruption in the development of the DBS service or in the business plans of those eager to participate in that development. By devising and implementing a system for reassigning ACC's channels within three months, we will resolve the reassignment issue in time for any potential recipient of those channels to proceed with its business plans with little or no interruption.

4. In making this decision, we also deny a request by EchoStar Satellite Corporation for an investigation of and sanctions for alleged improper and undisclosed *ex parte*

contacts in this proceeding.[2] Since the prohibited *ex parte* presentations were promptly disclosed once their significance became known, and since the arguments made in those presentations have been raised by petitioners in this proceeding and fully addressed by EchoStar and other opponents, we conclude that no harmful prejudice has occurred.

II. BACKGROUND

A. *The Evolution of the DBS Service*

5. In 1982, we granted the first authorizations for DBS service—satellite systems that would deliver video programming "direct to home" via backyard receiving dishes.[3] Our primary goals in initiating this new service were to provide additional competition to existing program providers such as cable television, to provide improved service to remote areas of the country, and to encourage innovative new programming and services.[4] DBS operators would transmit satellite signals from one or more of the eight orbital positions allocated to the United States pursuant to the Region 2 Plan adopted at the 1983 Regional Administrative Radio Conference ("RARC-83").[5] Thirty-two channels were available for

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[2] In both its Opposition and in a June 13, 1995 letter to the Managing Director, EchoStar requested, *inter alia*, an investigation into whether additional undisclosed prohibited *ex parte* communications had occurred in the proceeding, and for imposition of sanctions against those who have already admitted to making such prohibited communications.

[3] *Direct Broadcast Satellite Service*, 90 F.C.C.2d 676 (1982). DBS is a radiocommunication service in which signals from earth are retransmitted by high power, geostationary satellites for direct reception by small, relatively inexpensive earth terminals.

[4] *Id.* at 680-82.

[5] *See Processing Procedures Regarding the Direct Broadcast Satellite Service*, 95 F.C.C.2d 250 (1983) ("*DBS Processing Order*"). The Region 2 Plan adopted at RARC-83 allocates orbital positions and channels for use in the Broadcast Satellite Service

use at each orbital location. With digital compression, each such "channel" currently can yield up to six channels of consumer programming.

6. Pursuant to our DBS rules and in lieu of stringent financial showings and subsequent Commission analysis, each DBS permittee must satisfy a two-prong due diligence requirement before a DBS license can be awarded.[6] The first prong of our due diligence requirement mandates that each DBS permittee must begin construction or complete contracting for construction of its system within one year of grant of its construction permit. The second prong requires that each permittee must begin operation of its system within six years after receipt of its construction permit. Specific orbital positions and channels are assigned on a first-come, first-served basis upon a determination that the permittee has satisfied the first prong contracting requirement. Thus, specific orbital/channel assignments are made in the order that first-prong due diligence demonstrations are received from permittees.[7] These requirements were intended to permit more orderly processing of applications and to ensure prompt and effective use of DBS spectrum resources.[8]

7. There have been five processing rounds for DBS applicants, the last in 1989. Prior to the last processing

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("BSS") in the Western hemisphere. The eight U.S. orbital positions, proceeding from east to west, are 61.5°W.L., 101°W.L., 110°W.L., 119°W.L., 148°W.L., 157°W.L., 166°W.L., and 175°W.L.

[6] *See* 47 C.F.R. § 100.19(b); *Direct Broadcast Satellite Service*, 90 F.C.C.2d at 719.

[7] *DBS Processing Order*, 95 F.C.C.2d at 253. Permittees apply separately for launch and operational authority once satellite construction is nearly complete. A license to operate a DBS satellite, for a five-year term, may be granted upon successful satellite launch and operation of the DBS service. *See, e.g., Hughes Communications Galaxy, Inc.*, DA 95-979 (May 1, 1995).

[8] *DBS Processing Order*, 95 F.C.C.2d at 253; *see also CBS, Inc.*, 99 F.C.C.2d 565, 568 (1984).

round, the limited number of applicants and channels requested, coupled with the flexibility of the international allocation of DBS resources in the Region 2 Plan, allowed us to grant authorizations at variance with that plan.[9] In the last round of DBS applications, however, requests for orbital/channel resources exceeded the available supply. In our 1989 order in *Continental,* we decided to assign half-CONUS[10] channels only in east/west pairs, so that each applicant could provide full-CONUS service. Service to the eastern half of the United States was to be provided from our eastern orbital locations, and service to the western half of the country was to be provided from the four western locations. Accordingly, beginning in 1989, new applicants received paired east/west assignments, and existing construction permits were modified to comply with the new assignment scheme. However, we authorized conditional full-CONUS coverage from the eastern orbital positions, provided that such service proved feasible and in keeping with United States treaty obligations.[11]

B. *ACC's History as a DBS Permittee*

8. In 1984, we granted a six-year DBS construction permit to ACC, subject to the condition that it "proceed with the construction of its system with due diligence as

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[9] For example, we had authorized the operation of two satellites at the same orbital location, with one satellite serving the eastern part of the country and one serving the western part of the country. *See Continental Satellite Corp.,* 4 FCC Rcd 6292, 6293 (1989), *partial recon. denied,* 5 FCC Rcd 7421 (1990) (*"Continental"*).

[10] Signals from DBS satellites that cover half of the continental United States are referred to as "half-CONUS" signals; those that cover the entire continental United States are referred to as "full-CONUS" signals.

[11] *Continental,* 4 FCC Rcd at 6292-93. At that time, the Commission did not have the resources necessary to determine whether full-CONUS service could be provided in technical compliance with the Region 2 Plan. *Id.*

defined in Section 100.19 of the Commission rules." [12] In 1986, we determined that ACC had satisfied the first prong of the due diligence requirement by contracting for the construction of two satellites.[13] Accordingly, we granted ACC's request for 16 channels at each of two orbital locations: 110° and 148°.[14] In a 1986 application to modify its construction permit, ACC requested assignment of additional channels at these locations. Pursuant to the assignment scheme adopted in *Continental*, we reserved (but did not assign) eleven additional pairs of channels for ACC, conditioned upon ACC's satisfaction of the first prong contract due diligence requirement for this modified DBS system.[15]

9. In October 1989, ACC submitted satellite contract information in compliance with the first due diligence requirement for its modified system. In 1990, ACC requested a four-year extension of time, until December 7, 1994, to construct and operate its DBS system. ACC cited "factors outside its control" in support of its extension request: (1) that designs made obsolete by technological advances necessitated numerous modifications; and (2) that changes and uncertainty in the Commission's channel allocation policy had delayed construction. ACC said that it had nonetheless spent "considerable" energy and funds in advancing satellite technology, including DBS digital technology.[16]

10. In April 1991, we granted ACC's extension request and assigned ACC 11 additional channels at 110°

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[12] *Satellite Syndicated Systems, Inc.*, 99 F.C.C.2d 1369, 1387 (1984).

[13] *Tempo Enterprises, Inc.*, 1 FCC Rcd 20, 21-22 (1986) ("*Tempo I*").

[14] *Continental*, 4 FCC Rcd at 6304 n.42.

[15] *Id.* at 6301. Thus, the Commission held 11 additional pairs of channels for ACC, which would be given specific assignments if and when ACC demonstrated contracting due diligence with respect to those new channels.

[16] Request for Additional Time to Construct and Launch Direct Broadcast Satellites, DBS-84-01EXT/88-05MP (filed Feb. 16, 1990).

and 8 additional channels at 148°, based on our determination that it had satisfied the first prong contracting due diligence requirement for its modified system.[17] The due diligence finding was based in part on ACC's contract payment schedule, under which it would have paid 14% of the total contract price by January 1992, 58.5% of the contract price by April 1993, and 83.5% of the contract price by January 1994, at which time its first satellite was scheduled for delivery. In granting the extension request, we specifically stated that "[*i*]*n the future, continued reliance on experimentation, technological developments and changed plans will not necessarily justify an extension of a DBS authorization,*" and noted that "*there does now appear* [*to be*] *a need for stricter enforcement of the construction progress requirements of the DBS rules.*"[18]

11. In August 1994, just four months before its construction permit was to expire, ACC requested a second four-year extension of time, based on the following assertions: (1) its three-year negotiation to reach a joint venture agreement; (2) modifications in its system design that delayed construction; (3) the "considerable" funds and "countless" hours expended to implement its system; and (4) regulatory delays in formulating channel assignment policy in *Continental* which affected the timing of the grant of ACC's modification requests.[19]

12. Seven weeks later, or just two months before its permit was to expire, ACC requested consent to assign

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[17] *Advanced Communications Corp.*, 6 FCC Rcd 2269, 2272 (1991), *recon. denied*, 6 FCC Rcd 6977 (1991) ("*Advanced*"). We assigned only eight channels at 148° since no more were available at that location. We denied ACC's request for three channels at 157° because ACC did not complete contracting for a fifth satellite at this location. *Id.* Three channels remain reserved for ACC but not yet assigned.

[18] *Id.* at 2274 (emphasis added).

[19] Request for Additional Time to Construct and Launch Direct Broadcast Satellites, DBS-84-01/94-11EXT (August 8, 1994).

its DBS construction permit to Tempo DBS,[20] which would in turn lease or sell the transponders at the 110° orbital position to Primestar Partners L.P.[21] The proposed assignment would permit Primestar's migration from medium-power direct-to-home fixed satellite service ("FSS") using approximately 36 to 40 inch receiving dishes, to high-power DBS service using 18 inch receiving dishes.[22]

13. In anticipation of this assignment, ACC also filed an application to modify its permit to conform to the specifications of two satellites being built under Tempo Satellite's DBS permit for an eleven-channel DBS system to be operated at 119° orbital location.[23] The practical effect of this request is that neither ACC nor Tempo DBS would build the two satellites ACC had contracted to purchase from Martin Marietta that had been the basis for ACC's due diligence showings. Instead, ACC or Tempo DBS would use two satellites being built for Tempo Satellite under Tempo Satellite's construction permit. ACC asked the Commission to give it credit for Tempo Satellite's efforts in determining whether ACC had met its due diligence obligations.[24]

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[20] Request for Consent to Assign DBS Authorizations, DBS-94-15ACP (September 28, 1994).

[21] TCI owns twenty-two percent of Primestar. The cable system operators that have ownership interests in Primestar are TCI, Time Warner, Inc., Cox Enterprises, Comcast Cable, Continental Cablevision, and Newhouse Broadcasting Corporation. GE American Communications, Inc., which owns the satellite that is currently used to provide Primestar service, is also an equity partner in Primestar. *See United States v. Primestar Partners, L.P.*, 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994).

[22] Tempo DBS App. for Review at 22.

[23] Application for Modification of Construction Permit, DBS-94-16MP (October 14, 1994). In November 1994, ACC filed an amendment to this modification request. Amendment of Application for Modification of Construction Permit, DBS-94-16MP (November 16, 1994).

[24] *See, e.g.*, ACC's Consolidated Opp. to Petitions to Deny at 15-18 (filed Nov. 23, 1994).

14. Included with ACC's assignment application was a Capacity Purchase Agreement ("CPA") between ACC and TCI. Under the CPA, TCI would provide ACC with the two satellites being built for Tempo Satellite, and pay over $45,000,000 in TCI common stock along with other monetary incentives. In return, ACC would irrevocably sell all of its rights to the transponder capacity on those satellites. This agreement was an alternative to the outright assignment of ACC's construction permit to Tempo DBS.[25]

15. In April 1995, the International Bureau found that ACC had failed to comply with its due diligence obligations, and therefore denied ACC's request for extension of time to begin DBS operations.[26] The Bureau concluded that ACC's failure to make any significant progress toward the launch and operation of its DBS system was the result of ACC's own business decisions, and that ACC also could not rely upon Tempo Satellite's investment in its satellites to satisfy ACC's due diligence obligations. Accordingly, ACC's DBS construction permit was cancelled, and its requests to assign and modify its permit were deemed moot.[27] ACC and others have filed Applications for Review of that decision by the Commission,[28] and these applications are opposed.[29]

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[25] ACC App. for Review at 19; Tempo DBS App. for Review at 8 n.4, 6 n.10.

[26] Bureau Order at ¶¶ 9-19.

[27] *Id.* at ¶¶ 20-21.

[28] The following parties filed Applications for Review ("App. for Review") on May 22, 1995: ACC; Tempo DBS, Inc.; Primestar Partners L.P.; General Instruments Corporation ("GIC"); and Cable Telecommunications Association ("CATA"). Some or all of these parties may be collectively referred to as "petitioners."

[29] Dominion Video Satellite, Inc. filed an Opposition ("Opp.") to the Applications for Review on May 26, 1995. The following parties filed Oppositions on June 6, 1995: EchoStar Satellite Corporation; Directsat Corporation; DIRECTV, Inc.; MCI Telecom-

16. DIRECTV asserts that CATA, GIC, and Primestar lack standing in this proceeding. None of these petitioners participated in the first stage of this proceeding. In such circumstances, Section 1.106(b)(1) of our rules, 47 C.F.R. § 1.106(b)(1), requires that they "show good reason why it was not possible for [them] to participate in the earlier stages of the proceeding." These three petitioners have not made this showing, and their respective applications for review will be dismissed. All of their arguments have been raised by the other petitioners, however, and so are addressed in full.

III. DISCUSSION

17. In support of their Applications for Review, petitioners argue, as detailed below, that the *Bureau Order*: (1) exceeds the Bureau's delegated authority; (2) conflicts with Commission precedent for considering due diligence and requests for extension of time; and (3) contravenes the Commission's goal of prompt initiation of competitive DBS service.[30] To the contrary, we find that the Bureau did not exceed its delegated authority, and it correctly applied Commission precedent in holding that ACC had failed to meet its due diligence obligations.

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munications Corporation; Entertainment Made Convenient (Emc^3) U.S.A., Inc.; Consumer Federation of America and the Center for Media Education; and the National Rural Telecommunications Cooperative. United States Satellite Broadcasting Company ("USSB") also filed Comments on the same date. Others filed informal comments in this proceeding as well. Some or all of these parties may be collectively referred to as "opponents." Also, as noted above, on June 13, 1995, EchoStar requested that the Managing Director undertake an investigation to determine whether any additional *ex parte* communications not permitted under our rules had occurred, and requested that sanctions be imposed against those who had admittedly engaged in prohibited presentations. The Managing Director has referred this matter to the full Commission. We address this matter in ¶¶ 75-79, *infra*.

[30] ACC App. for Review at 11, 18; Tempo DBS App. for Review at 11-24.

A. *Due Diligence Obligations*

1. Delegated Authority.

18. Petitioners contend that the Bureau exceeded its delegated authority in denying ACC's application for an extension of time.[31] They assert that the *Bureau Order* constitutes an "unprecedented and inexplicable" break with Commission precedent, since it is the first time that a DBS construction permit has been cancelled based on a permittee's failure to meet the second prong of the due diligence rule.[32] For the reasons stated below, we find that the Bureau's action was consistent with our precedent.[33]

19. At the inception of DBS service, the Commission established a minimal number of rules designed to foster the development of the fledgling service.[34] The Commission determined that the public interest would best be served by affording DBS permittees maximum flexibility in order to facilitate the introduction of a new service that

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[31] Pursuant to Section 0.261 of the Commission's Rules, 47 C.F.R. § 0.261, the Chief of the International Bureau is delegated a wide range of authority to perform most of the functions of the bureau, which include "administer[ing] policies . . . [for] domestic and international satellite systems" and "monitor[ing] compliance with the terms and conditions of authorizations" such as those at issue in this proceeding. *See* 47 C.F.R. § 0.51(c)-(d). This delegated authority is subject to specific limitations that preclude action on applications that present novel questions of fact, law, or policy that cannot be resolved under outstanding precedents or guidelines, or that appear to justify a change in Commission policy. *Id.* at § 0.261(b).

[32] *See, e.g.*, ACC App. for Review at 1, 12-14; Tempo DBS App. for Review at 11-13.

[33] In addition, we note that since we are now deciding this case on the merits, the issue of whether the Bureau exceeded its delegated authority is moot.

[34] There are only nine regulations directly applicable to DBS service. *See* 47 C.F.R. Part 100.

was untried and unproven, both technically and financially.[35] Among the few rules imposed was the two-part due diligence requirement, to which exceptions would be allowed only in the "most extraordinary circumstances." [36]

20. Under the first prong of our due diligence rule, we have taken action against applicants who failed to go forward with the construction of a DBS system. Since the rule "was intended to ensure the prompt initiation of DBS service for the public," we said that it "must be enforced where permittees are allowed to hold spectrum resource for which other applicants exist." [37] As a result, between 1984 and 1989, a total of seven permittees were stripped of their permits for failure to comply with the first due diligence requirement.[38] In addition, we recently cancelled the orbital positions and channels (but not the construction permit) assigned to Dominion Video Satellite, Inc. for failure to demonstrate compliance the first due diligence requirement in a timely manner.[39]

21. Nevertheless, throughout the first decade of DBS's existence—what we have previously described as the "pioneering era" of this service [40]—the Commission exercised flexibility where the public interest so required. The Commission was reluctant to cancel construction permits for failure to initiate DBS service "in accord with a pre-

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[35] *Direct Broadcast Satellite Service*, 90 F.C.C.2d at 706-08.

[36] *DBS Processing Order*, 95 F.C.C.2d at 254.

[37] *CBS, Inc.*, 99 F.C.C.2d at 571-72.

[38] *See CBS, Inc.*, 99 F.C.C.2d at 566, 571-73 (CBS and Graphic Scanning Corp.); *Tempo I*, 1 FCC Rcd at 21 (NEXSAT); *RCA American Communications, Inc.*, 2 FCC Rcd 1204, 1205 (1987) (RCA Americom, Antares Satellite Corp., and Digital Paging of Texas, Inc.); *Continental*, 4 FCC Rcd at 6296 (1989) (DBSC).

[39] *Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680, 6687 (1993), *recon. denied*, FCC No. 95-421 (Oct. 5, 1995) (*"Dominion"*). The *Dominion* decision is discussed more fully in ¶ 25, *infra*.

[40] *E.g., Advanced*, 6 FCC Rcd at 2274.

established timetable set without the benefit of experience."[41] For example, in granting ACC's first four-year extension, we based our decision on the substantial developments in DBS satellite technology, the Commission's development of its policy regarding channel and orbital assignments, and the Challenger and Ariane launch vehicle failures of the late 1980's.[42] Such factors, which would have been outside any permittee's control, were the type of "extraordinary circumstances" that justified extension.

22. But even as we granted such extensions, we separately cautioned that extensions would be more difficult to obtain in the future. We noted that:

> [a]s circumstances have evolved and demand for DBS facilities may be increasing beyond the available supply of orbit/channel resource, there does now appear [to be] a need for stricter enforcement of the construction requirements of the DBS rules.[43]

We stated that it is "imperative that inefficient use of DBS assignments, whether intentional or inadvertent, be prevented, particularly if it becomes evident that incumbent permittees are unjustifiably preventing additional promising parties from attempting to deliver DBS services."[44] We also explicitly put permittees on notice that uncertainties in or miscalculations of the business climate are not factors beyond permittees' control that could justify an extension, but rather are risks that each permittee must bear alone: "[n]either other existing or potential DBS participants nor the Commission can, or should be

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[41] *United States Satellite Broadcasting Co.*, 3 FCC Rcd 6858, 6860 (1988) (*"USSB I"*).

[42] *Advanced*, 6 FCC Rcd at 2274.

[43] *USSB I*, 3 FCC Rcd at 6861 (quoted in *Advanced*, 6 FCC Rcd at 2274).

[44] *Id.*

expected to, accommodate their mistaken projections or modified expectations." [45]

23. Four years ago, we said that "DBS continues to be 'unproven as a technology and as a commercial enterprise.' " [46] In granting ACC's request for a four-year extension that year, however, we explicitly warned that "[t]here will soon come a time when the pioneering era of the development of DBS technology and service will come to an end." [47]

24. The last four years have ushered in that new era. Two permittees (DIRECTV [48] and USSB) already have their DBS systems in operation, and a third (EchoStar/Directsat) is to launch one satellite this fall and another in 1996. Tempo Satellite is scheduled to launch in June 1996. Under these circumstances, a permittee's inability or unwillingness to proceed with construction of its system weighs even more heavily against allowing it to retain its permit.[49]

25. ACC argues that the Commission has applied a "flexible policy" as recently as 1993, when we issued our *Dominion* order.[50] In that order, we stripped Dominion of its orbital/channel assignments because of its failure over a two-year period to respond to one Commission order and several requests from the staff for information

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[45] *Id.* at 6859.

[46] *Advanced,* 6 FCC Rcd at 2273 (quoting *USSB I,* 3 FCC Rcd at 6859).

[47] *Id.* at 2274.

[48] DIRECTV is a wholly-owned subsidiary of GM Hughes Electronics and an affiliate of Hughes Communications Galaxy, Inc. ("Hughes"). Hughes is a Commission licensee in the high-power DBS service, and DIRECTV is the DBS operating, customer service, and programming acquisition arm of Hughes. Both Hughes and DIRECTV are subsidiaries of General Motors.

[49] *See USSB I,* 3 FCC Rcd at 6858.

[50] *See* ACC App. for Review at 15.

necessary to demonstrate compliance with the first due diligence requirement.[51] Dominion's inordinate delay in submitting the required information caused a prejudicial delay of assignments to other DBS permittees who were behind it in the assignment queue. The appropriate sanction in that situation was revocation of Dominion's assignments and sending it to the end of the assignment queue. In the same order, we also extended Dominion's DBS permit based on the "reasonable degree of continuity in [Dominion's] efforts to establish its DBS system."[52] We noted that Dominion had developed a financing program, contracted for home receiving equipment, and obtained a contract for launch services—all part of satisfying the *second* prong of due diligence.[53] None of the demonstrated progress toward an operational DBS system that justified our flexibility in *Dominion* is present in this case.

26. It is true, however, that the Commission has never denied an extension of time to a DBS permittee for failure to progress toward compliance with the *second* due diligence requirement.[54] From this, ACC argues that any decision to take such an action would be an "unprecedented and inexplicable" departure from Commission precedent.[55]

27. We disagree. Consistency with prior precedent is not determined by whether the same *outcome* has been reached. Rather, it is determined by whether the Com-

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[51] *Dominion*, 8 FCC Rcd at 6687.

[52] *Id.* at 6688.

[53] *Id.*

[54] The *Bureau Order* erroneously stated that certain language quoted from *USSB I* was used in *denying* an extension to another DBS permittee. *See Bureau Order* at ¶ 13 (quoting *USSB I*, 3 FCC Rcd at 6859). This misstatement does not detract from the logic of the order, which was based on the Commission's often-expressed desire for stricter enforcement of due diligence requirements, rather than the outcome of any particular case.

[55] *See* ACC App. for Review at 1.

mission's rules and orders have been applied faithfully. We have repeatedly expressed our commitment to enforcing the due diligence rules. The fact that others have demonstrated sufficient commitment to justify extensions does not require us to grant *every* such request. As we explain below, if warranted under the circumstances of this case, we do not consider it a departure from precedent to cancel a DBS construction permit based on the permittee's failure to demonstrate sufficient progress toward compliance with the second prong of the due diligence requirement. We now turn to the question of whether the facts of this case justify cancellation of ACC's permit.

2. Application of the Due Diligence Standard

28. As we stated in granting ACC its first extension, "[t]he Commission closely scrutinizes all requests for extensions of time within which to comply with its rules and policies." [56] In ruling on a request for extension of time, the Commission must assess the totality of circumstances: "those efforts made and those not made, the difficulties encountered and those overcome, the rights of all parties, and the ultimate goal of service to the public." [57] The Bureau concluded from its assessment of the totality of the circumstances that ACC had made little progress in construction, launch, and initiation of a DBS system in the past decade—particularly during its four-year extension—and therefore that an extension was not justified.[58] Upon close scrutiny of ACC's extension request, we conclude that the Bureau was correct.

29. ACC contends that it has not been "warehousing" its DBS authorizations. ACC has focused its argument upon three areas: (1) the efforts made by ACC in de-

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[56] *Advanced*, 6 FCC Rcd at 2274.

[57] *USSB I*, 3 FCC Rcd at 6861.

[58] *Bureau Order* at ¶¶ 13-20.

veloping its DBS system; (2) the agreement between ACC and TCI for construction and launch of a satellite licensed to ACC; and (3) ACC's negotiations for a joint venture with another DBS permittee, EchoStar. In addition, ACC asserts that the circumstances of this case are indistinguishable from those of two other cases in which the Commission either granted an extension or allowed a transfer of control.[59]

a. ACC's Efforts

30. ACC argues that the Commission should consider its efforts "to make DBS a reality," including: (1) the promotion of digital transmission technology; (2) the development of plans to provide educational programming; (3) advocacy of interactive service by DBS systems; and (4) participation in legislative, regulatory, and publicity efforts to promote the development of DBS.[60]

31. For purposes of our due diligence analysis, we must recognize that *none* of the efforts cited by ACC involves the actual construction of a DBS satellite or arrangement for launch- and operation-related services. While promotional efforts may be laudable, those efforts are not an adequate substitute for the concrete progress toward the construction and operation of a DBS system that is required under our rules.

32. In the past, we have specifically deemed such generalized efforts toward promoting the DBS service insufficient to satisfy the first due diligence prong. For example, although we "recognize[d] the efforts CBS has made to date in developing DBS and HDTV technology," we held that CBS had not met its due diligence obligation for the simple reason that it did not have a signed contract

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[59] *Id.* at 19-20 (citing *United States Satellite Broadcasting Co.*, 7 FCC Rcd 7247 (Vid. Svc. Div. 1992) (*"USSB II"*) and *Directsat Corp.*, 10 FCC Rcd 88 (1995)). These cases are discussed *infra*, ¶¶ 46-63.

[60] *Id.* at 6-8.

for the construction of its satellite.[61] Similarly here, without demonstrated concrete progress toward construction and operation of a DBS system, we cannot say that the initial assignment of scarce public resources to ACC continues to be justified.

33. Since 1991, when we cautioned ACC and all other permittees that extensions would be more difficult to obtain in the future,[62] we have granted extensions on only two occasions. The record in those cases demonstrated that the permittees had made significant progress toward the realization of a DBS system, including substantial monetary investment, arranging for financing for completion and launch of the system, contracting with suppliers of DBS home receiving equipment, and contracting for satellite launch services.[63] These are the kinds of indicia of progress that we look for in evaluating an extension application. Neither these nor any comparable indicia are present in this case.

34. ACC asserts that it was the first to advocate the implementation of digital transmission technology, which it began to incorporate into planning for its system as early as 1986.[64] ACC seeks credit for persevering in its efforts to drag the industry to this higher standard, noting the resistance of other permittees such as DIRECTV that ultimately came to adopt the same technology.[65] We do not disparage these efforts. It is more notable, however, that DIRECTV, which originally opposed this technology, had sufficient time since we approved ACC's use of digital technology in 1991 not only to change its design to incorporate digital transmission, but also to construct and

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[61] *CBS, Inc.*, 98 F.C.C.2d at 1069.

[62] *See Advanced*, 6 FCC Rcd at 2274.

[63] *See Dominion*, 8 FCC Rcd at 6688; *USSB II*, 7 FCC Rcd at 7251.

[64] ACC App. for Review at 6.

[65] *Id.* at 6-7.

launch a satellite based on that design.[66] During the same three year period, ACC—which by its own admission had a five-year head start—failed to progress toward the realization of its DBS system.

35. ACC also argues that the Bureau erroneously ignored ACC's continued compliance with the first due diligence requirement.[67] In order to satisfy the first prong of the due diligence requirement for its first 16 paired channels, ACC submitted a construction contract that provided for complete construction of its two satellites by December 1990 and June 1991, respectively.[68] After our order in *Continental*, ACC filed a due diligence showing for its 11 additional paired channels in October 1989 that provided for completion of its first satellite by June 1993, which six months later was revised to January 1994.[69] But in May 1993, ACC submitted an amended contract with an updated timetable showing that construction on its first satellite would not begin until October 1993 (almost three years after it was originally supposed to be finished), with progress payments stretching until approximately September 1995.[70] In April 1994, ACC submitted yet another amended contract that set April 1995 (four and a half years after the original *completion* date) as the new date for *beginning* construction, with progress payments stretching until March 1998.[71] ACC states that it

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[66] *See* Hughes' Application for Minor Modification of Construction Permit and Technical Showing Regarding Compliance with International Requirements, FCC File No. DBS-91-02MP/Minor (July 15, 1991); *Hughes Communications Galaxy, Inc.*, 8 FCC Rcd 8116 (1993) (launch authorization).

[67] ACC App. for Review at 12.

[68] *See Tempo I*, 1 FCC Rcd at 21.

[69] *See* ACC Semi-Annual Report (dated April 4, 1990); *Advanced*, 6 FCC Rcd at 2270-72.

[70] *See* ACC Semi-Annual Report (dated May 10, 1993).

[71] *See* ACC Semi-Annual Report (dated April 27, 1994).

paid some still undisclosed amount for the "Systems Design and Definition Phase," nonetheless it has not made any progress payments for actual construction. Meeting the first due diligence requirement does not justify failing to fulfill the second. Otherwise, permittees could extend indefinitely their nonperformance by repeated modifications of their proposals. As we previously advised ACC, "construction must begin at some point." [72]

36. In granting ACC its first four-year extension, we recognized that practical impediments beyond ACC's control justified flexibility. However, as ACC acknowledges, it has had at least three years since the Commission definitively established the orbital locations and technical parameters of ACC's permit.[73] ACC has cited no factors outside its control to explain its lack of significant progress toward construction and launch of its satellites over that period, which comprised almost all of the four-year extension we previously granted. Due to its extended inaction and apparent lack of commitment to operating its own system, ACC is not "much closer to the threshold of providing service than any non-permittee," and thus has no claim to any comparative advantage that could justify an extension.[74]

37. The bottom line is that ACC has not achieved any concrete progress toward the actual construction and operation of its DBS system. While its other activities may be laudable, our precedent makes it clear that diligent progress toward actual operation which must be the touchstone for our analysis of whether to grant an extension.

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[72] *Tempo I*, 1 FCC Rcd at 20.

[73] *See* ACC App. for Review at 9-10.

[74] *See USSB I*, 3 FCC Rcd at 6860. ACC's reliance on the CPA to support its "threshold" argument is specious; any other entity that had been assigned ACC's channels and orbital locations could enter into the same agreement and instantly be just as close to initiating service as is ACC. *See* discussion of the CPA in Section III.A.2.b, *infra*.

b. The ACC/TCI Capacity Purchase Agreement

38. In their Applications for Review, petitioners assert that the Bureau ignored the Capacity Purchase Agreement ("CPA"), which they characterize as a binding contract for the launch, deployment, and operation of satellites by ACC. They further aver that the $250 million spent by Tempo Satellite on the satellites TCI agreed to provide to ACC should be attributed to ACC, and that it is TCI that is contributing to ACC's DBS program—not the other way around.[75]

39. Under the CPA, ACC would not pay for the construction, the launch, or the operation of any DBS satellites. ACC would not own any satellites. Its sole contribution would be the FCC permit. Indeed, the CPA provided for the complete and immediate liquidation and dissolution of ACC upon the consummation of this "sale" of transponder capacity.[76] In these circumstances, the CPA cannot fairly be characterized by petitioners as an arrangement by ACC for the launch, deployment, and operation of its own satellite system.[77]

40. TCI, by contrast, would be responsible for virtually every aspect of the transaction and subsequent operation of the DBS system. Pursuant to the CPA, TCI would pay all costs for the "design, construction, launch, deployment, operation, and insurance of the satellite," and

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[75] *See* ACC App. for Review at 19; Tempo DBS App. for Review at 7-10. The CPA was not submitted as part of original extension application, but rather as part of the assignment application filed seven weeks later—just before the end of its four-year extension.

[76] *See* CPA at § 2.3. Upon dissolution, ACC would transfer its permit to its sole shareholder, Daniel Garner. *Id.* at § 9.1.2.

[77] Some opponents assert that the CPA transaction would result in an unauthorized *de facto* transfer of control from ACC to TCI. *See* DIRECTV Opp. at 11; EchoStar Opp. at 10. Our resolution of this case on due diligence grounds has rendered that contention moot, and therefore we do not reach it.

would be its actual owner.[78] TCI would also be responsible for arranging and paying for appropriate facilities for tracking, telemetry, and control ("TT&C") of the satellite, and for performance of the TT&C functions once in operation.[79]

41. ACC's assertion that the CPA demonstrates significant progress toward *its* construction and operation of *its* DBS system is not persuasive. The staff correctly focused on the fact that ACC's sole contribution to this DBS system appears to be its authorization to use public resources. *Bureau Order* at 6 n.24. ACC will have no part in the ongoing operation of the DBS system that will use its 27 channels at the 110° orbital location. Not only has ACC contracted away all control over the use of those channels as part of the CPA,[80] but it has also agreed to immediately dissolve as part of the transaction. Moreover, the two satellites for which ACC seeks due diligence credit are currently part of Tempo Satellite's due diligence progress toward construction and operation of *its* DBS

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[78] *See* CPA at §§ 3.1, 3.3. The CPA provides that TCI's services in construing and operating the satellites are "subject to ACC's ultimate control as holder of the FCC Authorization." *Id.* This does not lessen the inference that TCI, and not ACC, was to be responsible for paying for and providing virtually all relevant aspects of DBS operations.

[79] *Id.* at § 3.4. In addition to providing one or more satellites and all related services necessary to their operation, TCI also agreed to: (1) make a non-refundable payment to ACC's sole shareholder, Daniel Garner, in the amount of $600,000; and (2) deliver to ACC certificates representing 2,000,000 shares of Class A common stock of TCI, with a current market value in excess of $45,000,000. *See* CPA at Recital C and § 2.2. TCI also made an interest-free loan of $2,000,000 to Garner, and has been paying him $30,000 per month since October 1994 for his services as a consultant. *See* ACC Agreement and Plan of Reorganization at § 3.4; Consulting Agreement at § 2(a).

[80] *See* CPA at § 2.1.

system.[81] This agreement cannot be characterized as a demonstration of *ACC's* due diligence.

42. ACC also faults the Bureau for considering the extension request apart from the modification application and the assignment application, since the Commission assertedly "eschewed such a piecemeal approach" in *USSB II*.[82] ACC's argument ignores a critical part of our reasoning in *USSB II*. Although the Commission found that granting USSB's extension and modification requests would serve the public interest, in order to grant them we first had to determine that USSB was in compliance with its due diligence obligations.[83] Here, in contrast, the Bureau conducted its compliance analysis first, and its conclusion obviated the need for any further inquiry into the merits of the modification and assignment applications. This approach conforms fully with the Commission's long-standing policies on assignment of authorizations.[84] In any event, reliance upon the proposed assignment to justify an extension would be futile, since our rules in the DBS service specifically provide that "[t]ransfer of control of the construction permit shall not be considered to justify extension of these [due diligence] deadlines."[85]

c. Negotiations with EchoStar

43. ACC also cites as grounds for an extension its efforts from early 1992 to late 1994 to form a joint venture with another DBS permittee, EchoStar—efforts that

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[81] *See* Tempo Satellite's Semi-Annual Report at 1 (dated May 18, 1995).

[82] *See* ACC App. for Review at 19 (citing *USSB II*, 7 FCC Rcd at 7249).

[83] *USSB II*, 7 FCC Rcd at 7250.

[84] *See Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (1964) (proposed assignment will not be considered until the Commission has determined that the assignor has not forfeited its authorization).

[85] *See* 47 C.F.R. § 100.19(b).

ultimately proved unsuccessful.[86] During those negotiations, ACC initially amended its construction contract to delay the start of construction on its first satellite until October 1993, and then delayed the start date until April 1995.[87]

44. We note that for over three years prior to its extension request, ACC had enough channels in a prime orbital location location to create a robust DBS system.[88] ACC nonetheless made a business decision to put off construction of its own satellites for three years while it negotiated to form a joint venture. That decision was ACC's to make, but it must bear the consequences of its actions in failing to proceed toward the launch and operation of its system during an extended period.

45. As the Bureau noted, the Commission has previously found that on-going negotiations do not justify an extension of DBS due diligence milestones: "failure to attract investors, an uncertain business situation, or an unfavorable business climate in general have never been adequate excuses for failure [to] meet a construction timetable in other satellite services."[89] Accordingly, failed negotiations, and the associated delays they may entail,

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[86] *See* ACC App. for Review at 10-11. In progress reports to the Commission, ACC said, in April 1992, that it was engaged in "serious negotiations" that it expected to complete in "the next month or two." In August 1992, ACC reported it had signed a letter of intent that called for execution of an agreement within sixty days. In October 1992, ACC explained that negotiations were continuing, and in April 1993, stated it expected to reach an agreement within the next month. In May 1993, it reported it was still in "complex negotiations," and in October 1993, it claimed that negotiations were continuing. However, on December 30, 1994, ACC indicated that negotiations had failed.

[87] *See* ¶ 35, *supra*.

[88] DIRECTV operates with 27 channels. USSB, which has 5 channels, operates independently. Of all existing DBS permittees, only DIRECTV has as many channels as ACC.

[89] *USSB I*, 3 FCC Rcd at 6859.

cannot provide any greater justification. These negotiations do not constitute adequate justification for the requested extension.

3. Commission Precedent

46. Petitioners also contend that the denial of ACC's assignment application directly conflicts with Commission precedent approving mergers and buyouts of DBS permittees. Specifically, petitioners argue that our actions in approving the sale of transponders from DIRECTV to USSB,[90] and the transfer of control of a DBS permit from Directsat Corporation to EchoStar,[91] mandate extension of ACC's construction permit. Upon review of these cases, we believe that neither case mandates such a result.

a. USSB II

47. The Commission first granted USSB's DBS construction permit in 1982.[92] In 1988, we granted a four-year extension of that permit.[93] We thereafter determined that USSB had complied with the first prong of the due diligence rules, and in 1990 assigned USSB channels at three orbital positions, including five channels at 101°.[94] On April 30, 1991, we assigned the remaining 27 channels at that orbital position to DIRECTV.[95] In July 1991 —less than three months later—USSB and DIRECTV proposed joint use of a satellite then being constructed for DIRECTV to implement their respective DBS systems. The Commission approved that proposal, including

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[90] *See USSB II*, 7 FCC Rcd at 7250-51.

[91] *See Directsat Corp.*, 10 FCC Rcd 88 (1995).

[92] *See CBS, Inc.*, 92 F.C.C.2d at 64.

[93] *See USSB I*, 3 FCC Rcd at 6859-61.

[94] *United States Satellite Broadcasting Co.*, 5 FCC Rcd 7576, 7577 (1990). USSB also was assigned three channels at 110° and eight channels at 148°. *Id.*

[95] *See Advanced*, 6 FCC Rcd at 2270.

the requested extension and modification of USSB's permit.[96]

48. Petitioners argue that the staff ignored parallels between ACC's requests and the Commission's approval of the USSB/DIRECTV transaction.[97] They say that USSB, like ACC, requested a second extension of time and modification of its construction permit to facilitate a cooperative venture. They say that USSB, like ACC, relied on a satellite planned for use in another permittee's DBS system to initiate its own DBS system. We disagree.

49. First, USSB had made a significant investment in its own DBS system, while ACC had not. Prior to grant of USSB's requests in 1992, USSB had accomplished the following: (1) spent more than $23 million for a portion of a satellite, which constituted approximately forty percent of the price of its five-channel payload on the satellite; (2) arranged to finance the remaining completion and launch costs of the satellite; and (3) executed contracts with various suppliers of DBS home receiving systems.[98]

50. By contrast, ACC's efforts to establish its own DBS system since the grant of its first extension of time have been minimal at best. Payments on ACC's satellite construction contract with Martin Marietta at the time of its application amounted to less than one percent of the contract price.[99] Although the Bureau's ruling relied

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[96] *USSB II*, 7 FCC Rcd at 7251.

[97] *See* ACC App. for Review at 15-16; Tempo DBS App. for Review at 15-16.

[98] *USSB II*, 7 FCC Rcd at 7250.

[99] ACC Semi-Annual Report (dated May 10, 1993). ACC's semi-annual report dated April 27, 1994, notes that eleven payments have been made; neither this nor any other filing subsequent to May 1993, however, states specific amounts or percentages of the contract price paid. Moreover, under both the CPA and the assignment agreement, TCI is obligated to reimburse any payment made by ACC on its construction contract after September 8, 1994. *See* CPA at § 13.16; Agreement and Plan of Reorganization at § 13.16.

upon ACC's apparent failure to make substantial payment toward construction and operation of a satellite system—and contrasted it with USSB's $23 million investment—ACC has failed to specify how much money it actually invested in the construction of its satellites.[100] Nor has ACC proffered any other contract for launch- or operations-related services under which ACC must make any further investment in its system. ACC's efforts (up to and including its agreements with TCI and Tempo DBS) consisted principally of negotiations for a merger or transfer of its construction permit—rather than development of its own DBS system.

51. Second, with regard to reliance on another permittee, USSB entered a cooperative venture while ACC proposes to dissolve—the two are not the same. USSB constructed and owns part of a satellite and operates its own system independently of DIRECTV, with "full operational control" over the transponders it purchased and "sole discretion" as to the content of the programming to be transmitted over its channels.[101] USSB has constructed its own national broadcast center, initiated and entered into its own contracts with programmers, and bears financial responsibility for its proportionate share (5/32) of the costs incurred in the development of a transmit/receive encryption system.[102] Moreover, USSB had paid $1.3 million for development of the satellites to be used for USSB's channels at the two other orbital locations that it does not share with DIRECTV, and had made separate arrangements for launch of those satellites.[103] By

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[100] To the extent ACC has submitted its construction contract with its semi-annual reports, it has redacted the figures for progress payments. Despite a request for these figures during an *ex parte* meeting with ACC, the company has not provided the requested information.

[101] *USSB II*, 7 FCC Rcd at 7249.

[102] *See* USSB Comments at 4.

[103] *Id.* at 7251.

contrast, ACC would own no part of the satellites to be launched: its control over the channels is irrevocably contracted away under the CPA and sold outright under the assignment agreement. ACC would also abandon its rights under its own satellite construction contract with Martin Marietta.[104] USSB's partial satellite ownership and independent operation are not comparable to ACC's arrangements either to "sell" transponder capacity to TCI or to assign its entire permit to Tempo DBS.

52. Finally, the timing of ACC's extension, assignment, and modification requests indicates that it did not intend to implement its DBS system alone or in cooperation with other permittees. ACC requested assignment of its permit just eleven weeks before it would have expired. Prior to that request, ACC had repeatedly revised its construction schedule to delay milestones and payments.[105] USSB, on the other hand, made its arrangements to share a satellite with DIRECTV at least a year in advance of the scheduled expiration of its construction permit, and less than three months after DIRECTV received its channel assignments at the common orbital location. Moreover, USSB made payments to DIRECTV totalling forty percent of the contract price before the Commission approved an extension of time, and continued to pay for development of two additional satellites, investing in the ultimate success of its own DBS system rather than speculating on the possibility of being rescued at the eleventh hour by a suitor.

53. USSB's investment in an independent DBS operation using a portion of DIRECTV's satellite is not analo-

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[104] After consummation of either the CPA and the transfer agreement, ACC would be obligated to maintain the construction contract in effect "for the benefit of TCI" if necessary to maintain the construction permit, and TCI would reimburse ACC for any payments made on that contract. *See* CPA at §§ 7.2, 13.16; Agreement and Plan of Reorganization at §§ 7.3, 13.16.

[105] *See* ¶ 35, *supra*.

gous to ACC's proposal either to sell transponder capacity on a satellite that it never contracted to build, or to transfer its permit outright and have no further involvement in the DBS service. As Tempo DBS said, "ACC does not propose to make any contribution to the Tempo program." [106] We consider the lack of ongoing involvement a key distinction between these two cases.

b. Directsat

54. Directsat received its DBS construction permit in August 1989.[107] We determined that Directsat had satisfied the first due diligence requirement in November 1993, and accordingly assigned it 10 channels at 119°.[108] Five months later, Directsat sought to transfer control of its permit to the parent company of EchoStar, which held 11 channels at the same orbital position.[109] We granted authorization for that transfer, specifically approving the for-profit nature of the transaction.

55. ACC and the other petitioners have argued that our resolution of the *Directsat* case mandates approval of ACC's extension application.[110] We disagree.

56. First, unlike ACC, Directsat *did not request an extension* of its DBS construction permit. Second, as we noted in granting the transfer application. Directsat's investment in the development of its DBS system had been "substantial," and its progress toward actual implementation had been "*steady and consistent with the schedule*

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[106] *See* Tempo DBS App. for Review at 10.

[107] *Continental*, 4 FCC Rcd at 6300.

[108] *Directsat Corp.*, 8 FCC Rcd 7962 (Vid. Svc. Div. 1993). Directsat was also assigned one channel at 110° W.L. and 11 channels at 175° W.L. *Id.*

[109] *Directsat*, 10 FCC Rcd at 88.

[110] ACC App. for Review at 21; Tempo DBS App. for Review at 17-19.

established in its construction contract." [111] By contrast, ACC has consistently delayed the schedule established in its construction contract.[112]

57. ACC argues that it has done as much as Directsat did, thus it too has proceeded with "due diligence." [113] This contention is not supported by the facts. First, the measure of what constitutes due diligence is different depending on where the permittee is in the term of its construction permit. Put another way, we expect an applicant to have accomplished more at the end of a permit's life than in the middle.[114] Second, even without this distinction, Directsat accomplished more than ACC has to date.

58. We recognize that a DBS permittee could encounter significant difficulty in proceeding with the construction of its system prior to receiving its specific orbital/channel assignments. Such information enables satellite contractors to order parts that are available only on several months' notice, complete satellite designs, and begin construction based on a particular satellite configuration.[115] Until a permittee receives its orbital/channel assignments, there is a practical limitation on the progress it can make toward construction of its satellites. Moreover, a permittee without specific assignments is in no position to negotiate with other permittees for joint or coordinated development of their systems. Thus, we draw

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[111] *Directsat*, 10 FCC Rcd at 89 (emphasis added).

[112] *See* ¶ 35, *supra*.

[113] ACC App. for Review at 21.

[114] As we previously advised ACC, "the grant of Advanced's extension request is not dependent upon a comparison between its showing and that of [another DBS permittee], but is instead dependent upon the merits of its showing." *Advanced*, 6 FCC Rcd at 2274.

[115] *See Dominion Video Satellite, Inc.*, DA 95-1734 (August 4, 1995).

a distinction between the progress we expect from permittees who have received orbital/channel assignments and those who are awaiting such assignments.

59. In this case, ACC received channel and orbital assignments, based on its 1990 due diligence showing, in April 1991, over three years prior to the expiration of its permit. Directsat submitted its due diligence showing five months after ACC, but received its channel and orbital assignments in November 1993—two and a half years after ACC and less than two years prior to the expiration of its construction permit. Despite ACC's early receipt of orbital/channel assignments, it failed to commence satellite construction or come to terms with any DBS permittee on joint development of a DBS system. ACC's merger negotiations with EchoStar continued for almost three years, from early 1992 through late 1994, during which time ACC repeatedly deferred its satellite construction milestones. Directsat, by contrast, successfully negotiated a merger with the same permittee, EchoStar, within five months of the award of its channel assignments.

60. When the Commission found that Directsat had satisfied the first prong of the due diligence obligation, it had a contract for delivery and launch of its first satellite in November 1997 and its second satellite in May 1998.[116] When the Commission granted the transfer of control to EchoStar, Directsat was still proceeding toward construction under the same contract with virtually the same timetable.[117] At the time the Commission found that ACC had met the first due diligence requirement as clarified in our *Continental* order, ACC's contract provided for delivery of its first satellite in January 1994.[118]

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[116] *Directsat Corp.*, 8 FCC Rcd at 7964 n.4.

[117] *See* Directsat Semi-Annual Report (dated August 16, 1994) (schedule calls for delivery of first satellite on January 2, 1998, and second satellite on July 2, 1998).

[118] *Advanced*, 6 FCC Rcd at 2272.

By May 1993, the delivery date had slipped to June 1996. By April 1994, construction was not even to *start* until April 1995, with delivery scheduled for the spring of 1998. All other payments and activities had been deferred accordingly.[119] Unlike Directsat, ACC was not proceeding on the contract that we had previously considered and used as a basis for assessing due diligence. ACC essentially abandoned construction of its DBS system during its negotiations with EchoStar. ACC could have struck a deal earlier. Alternatively or in tandem, it could have proceeded to build its system. It made a business decision to do neither until its permit was about to expire.

61. The for-profit sale of a construction permit for an unbuilt radio or television broadcast station is prohibited by the Commission's rules.[120] In *Directsat*, we said that the reasons underlying this restriction—maintaining the integrity of the application process and promoting the expeditious inauguration of new service—serve important Commission objectives. But we held that a similar restraint need not be applied to DBS precisely because we had adopted due diligence and semi-annual reporting requirements to accomplish these same ends.[121]

62. *Directsat* stands for the proposition that there is no *per se* rule against selling a DBS construction permit for profit. It does not suggest that a construction permit should be extended for a party that has not been proceeding with due diligence, simply because that would allow the party to sell the permit for profit. In fact, the contrary is true. *Directsat* allows for-profit sales of permits based on the assumption that our due diligence rules will suffice to prevent warehousing.[122] For this assump-

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[119] ACC Semi-Annual Reports (dated May 10, 1993 and April 27, 1994).

[120] *See* 47 C.F.R. § 73.3597(c)(2).

[121] *Directsat*, 10 FCC Rcd at 89.

[122] The Commission's policy against warehousing is "designed to prevent an entity from acquiring, or retaining, orbital spectrum

tion to make any sense, we must enforce our due diligence rules, not extend the permit of those who have not met their obligations.

63. Directsat negotiated and consummated a transaction with EchoStar in five months that had eluded ACC for almost three years. While negotiating, Directsat continued to progress toward construction and operation of its DBS system, whereas ACC did not. Even ignoring the fact that Directsat did not request an extension of its permit, the circumstances of its case differ so markedly from the circumstances of this case that it serves only to demonstrate that a different outcome is appropriate here.[123] Our *Directsat* decision therefore lends no support to ACC's position.

B. *Method for Future Assignments of DBS Resources*

64. The DBS due diligence rules were designed to ensure that permittees would go forward expeditiously with the development of their systems. In this case, ACC's lack of due diligence has resulted in a warehousing of spectrum from which it now seeks to profit. Such a result would be contrary to the public interest in the prompt and efficient use of DBS spectrum to provide a competitive service to the public. Since ACC has failed to fulfill its due diligence obligations, its DBS construction permit will be cancelled and the associated orbital channel assignments will revert to the public for reassignment.

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on the basis of speculative demand at the expense of other potential users." *GTE Corp. and Southern Pacific Co.*, 94 F.C.C.2d 235, 261 (1983).

[123] Petitioners assert that if we apply the same due diligence standard to Directsat as was applied to ACC, we will be forced to deny the extension requested by Directsat, whose permit expired on August 15, 1995. *See* ACC App. for Review at 18 n.38; Tempo DBS App. for Review at 20. We will apply the same criteria to Directsat as we have applied to ACC in determining whether an extension is justified

65. In our *Continental* order, we stated that,

> in the event the permit of any of these applications, or of any of the current permittees, is surrendered or cancelled, the remaining permittees from this group will have the first right to additional allocations, apportioned equally, up to the number requested in their applications.[124]

At that time, we determined that such an assignment scheme would result in the most prompt disposition of the then-pending applications, and therefore would be preferable to any available comparative procedure. In almost six years since that decision, we have not had occasion to reassign any surrendered or cancelled channels.

66. EchoStar, Directsat, DBSC, and Continental ask that we reassign ACC's channels to the remaining DBS permittees, in accordance with the assignment policy announced in *Continental*.[125] However, based on the record in this proceeding, the development of DBS service and technology since 1989, and our new auction authority granted by Congress, we believe this assignment method appears no longer to serve the public interest. For the reasons discussed below, we are currently of the view that the *Continental* assignment scheme should be abandoned, and that recaptured channels (and associated orbital locations) should be subject to a new window for applications for DBS authorizations. This window would be open to new entrants and current permittees alike, and mutually exclusive applications would be decided by auction. Accordingly, we intend to issue a Notice of Proposed Rule Making that reflects this approach by the

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[124] *Continental*, 4 FCC Rcd at 6299.

[125] Letter from EchoStar to William F. Caton, dated May 12, 1995; Letter from Directsat to William F. Caton, dated May 18, 1995; Letter from Continental to William F. Caton, dated June 19, 1995; and Letter from DBSC to William F. Caton, dated July 7, 1995.

end of this month, and to reach a final determination before the end of the year.

67. In this order, we have discussed three important policy goals for DBS service: (1) efficient use of a valuable public resource (DBS channels); (2) promotion of DBS as a competitor to cable; and (3) prompt delivery of DBS service to the public. It appears that the current DBS assignment policy involves inherent administrative delay and uncertainty, and hence does not facilitate the rapid use of DBS spectrum resources for delivery of service to the public. The failure of existing procedures to produce numerous DBS operators has also impeded progress toward our goal of having DBS compete directly with cable.[126] Moreover, the current assignment scheme appears to hamper implementation of viable DBS systems and may not reflect the evolution of the DBS industry since its adoption, and therefore may no longer be consistent with these goals. Nor is it consistent with the public interest in "recover[ing] for the public of a portion of the value of the public spectrum resource made available for commercial use." [127]

68. In 1989, when the number of orbital locations and channels sought exceeded the number available in the last DBS processing round, lotteries and comparative hearings were the only options for assigning these resources.[128] Each of the then-available options for resolving mutually-exclusive applications involved complex processing proce-

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[126] This goal is shared by Congress, which indicated in the Cable Act of 1992 its strong support for services (like DBS) that compete with cable. *See* 47 U.S.C. § 748.

[127] *See* 47 U.S.C. § 309(j)(3)(C). We note that MCI has stated that it would submit an opening bid of $175 million for the 27 reclaimed channels at the 110° orbital location. *See* Letter from Gerald H. Taylor, President and Chief Operating Officer of MCI, to Hon. Reed E. Hundt (dated Oct. 10, 1995).

[128] *Continental*, 4 FCC Rcd at 6293.

dures and significant regulatory delay. We resolved the issue by granting each application only to the extent that it was possible to award an equal number of channel reservations to each applicant.[129] This assignment scheme favored mergers over mutual exclusivity among DBS permittees by assigning fewer channels than were sought by each permittee for construction of an independent DBS system.

69. This method of accommodating all applicants appears to have created significant delay in making DBS orbital/channel assignments. Unlike fixed-satellite service operators, which receive construction authorizations and orbital location assignments at the same time. DBS permittees are assigned specific channels and orbital locations on a first come, first served basis only after demonstrating proper satellite construction contracting.[130] The due diligence analysis on which these assignments are based is time-consuming and exacting. While some permittees proceed apace as assignments are made, other permittees may seek to negotiate mergers or cooperative ventures, and put construction of a DBS system on hold while waiting for a clearer picture of ultimate orbital/channel assignments to emerge. Even sincere efforts to forge a cooperative DBS venture can involve delay as

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[129] We reserved eight paired channels (the total number requested) for USSB and eleven paired channels each for ACC, Continental, EchoStar, Directsat, DBSC, Tempo Satellite, and Hughes/DIRECTV. *Id.* at 6300-01 and 6304 n.43. These channel reservations were 5 paired channels fewer than had been requested by ACC, EchoStar, Directsat, Tempo Satellite, DBSC, and DIRECTV, respectively, and 5 paired and 8 full-CONUS channels fewer than had been requested by Continental. *Id.* at 6295-97.

[130] *See, e.g., Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, 3 FCC Rcd 6972 (1988); *American Satellite Co.*, 3 FCC Rcd 6969 (1988); *see also Establishment of Rules and Policies for the Digital Audio Radio Satellite in 2310-2360 MHz Frequency Band*, FCC No. 95-229, June 15, 1995 (proposed rules provide for simultaneous grant of applications and assignment of orbital locations).

parties negotiate agreements and seek the necessary Commission approval of a merger or sale.[131] Moreover, requests for extension of time, modification requests, and transfers or assignments all require independent review by the Commission, in addition to the analysis of each permittee's due diligence demonstration.

70. It appears that such delays would only be perpetuated by reassignment of ACC's channels under the policy announced in *Continental*. In that case, six permittees (other than ACC) received a total of 30 paired and 8 full-CONUS channels fewer than they had requested.[132] Under *Continental*, each of those permittees would have the first right to a *pro rata* distribution of ACC's cancelled channels. As a result, six permittees would be assigned four paired channels each, further complicating the already fractured distribution of DBS channels.[133] Since four channels may not provide sufficient capacity to operate a viable system,[134] such piecemeal assignment of channels could render the potentially full-CONUS orbital location at 110° unusable by any single permittee. We could then anticipate further delays as the permittees negotiated to aggregate a sufficient number of channels (by merger or buyout) to justify the expense of launching a DBS service at that location. In the mean-

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[131] We reemphasize here that, while some delays may result during negotiations on mergers or cooperative arrangements, the negotiating parties must still comply with our due diligence requirements, and failure to make appropriate progress towards completion of an operational system is not excused by such negotiations.

[132] *See* footnote 129, *supra*.

[133] For example, Directsat has been assigned a single channel at 110°, and USSB has three channels at the same location. *See* footnotes 94 and 108, *supra*.

[134] Tempo Satellite has recently indicated that even the 11 channels it has at 119° "are not sufficient for a competitive system." *See* letter from Richard E. Wiley to Hon. Reed E. Hundt at 2 (dated August 15, 1995).

time, the public would suffer as these valuable DBS resources went unused.

71. In addition, we fear that assigning channels pursuant to *Continental* will indefinitely delay completion of the last DBS processing round. This is a real prospect because the requests for a total of 30 paired and 8 full-CONUS channels of the six permittees who received fewer channels than requested in *Continental* could not be satisfied by distributing ACC's 27 cancelled pairs of channels. Absent a change in policy, these requests could only be satisfied upon cancellation or surrender of another's permit. Thus, existing DBS processing procedures, in combination with the policy adopted in *Continental*, have not fostered the swift construction and operation of DBS systems.

72. It is our current opinion that opening a window for new applications for DBS permits to use reclaimed channels (and orbital positions), and then deciding among mutually exclusive applications by auction, will best serve the public interest. EchoStar argues that the Commission may not revisit the *Continental* decision without prior notice to the public and a complete record on the issue of channel/orbital assignments.[185] Our decision to initiate a rulemaking proceeding on these issues (*see* ¶ 66, *supra*) obviates these concerns. Moreover, our commitment to expedite that rulemaking will ensure that the cancelled channels are reassigned, either by auction or some other method, in January 1996.

73. It does not appear that adoption of a new assignment method would present a significant barrier to successful implementation of DBS service by the parties affected. All of the permittees have received the orbital/channel assignments that we specifically reserved for them in *Continental*, and no permittee has received any additional assignments as a result of cancelled or surrendered per-

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[185] *See* EchoStar Opp. at 32-33; Letter from EchoStar to William F. Caton, dated June 16, 1995.

mits.[136] Although existing permittees' DBS plans may be sufficiently flexible to incorporate additional channels, several are already, or very soon will be, successfully operating their DBS systems without the further assignments. Moreover, we suggested in *Continental* that permittees enter cooperative ventures if existing assignments proved insufficient. Permittees that have done so have met with success: Directsat has joined with EchoStar and they are scheduled to begin operations within months; DIRECTV and USSB currently provide independent services from a shared satellite. Thus, plans of existing permittees and licensees for DBS service will not be unduly disrupted if they receive no additional channels assignments.

74. For the foregoing reasons, we will initiate a rulemaking proceeding this month to consider new rules for the DBS service. This proceeding will consider new processing procedures and auction rules to assign any available DBS orbital/channel resources. We may also propose rule changes in the wake of DIRECTV/USSB's successful deployment of full-CONUS DBS service. We approved such service only on a conditional basis in 1989 due to uncertainty about its technical feasibility. In light of its apparent success, certain aspects of our assignment policy need to be reconsidered. We intend to adopt rules to usher in a new era of DBS service to the public, in which DBS orbital/channel assignments are swiftly utilized and the public reaps the full benefit of DBS spectrum resources.

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[136] Two permittees have not yet received assignments for their western orbital locations only, one because it had not yet demonstrated due diligence in contracting for its western satellite, and the other because it had not yet indicated which western orbital location it preferred. *See EchoStar*, 7 FCC Rcd at 1771; *Dominion Video Satellite, Inc.*, DA 95-1734 (August 4, 1995).

C. *EchoStar's Request as to Prohibited Ex Parte Communications*

75. On May 30, 1995, the Commission's Acting Secretary, on behalf of the Managing Director, notified the parties of several prohibited *ex parte* communications that had occurred in this proceeding.[137] These communications were comprised of: (1) three oral presentations by a CATA representative made by telephone to two Commissioners' legal assistants on May 2, 3, and 4, 1995; and (2) three oral presentations made by representatives of CATA, C-SPAN, and Comcast, respectively, to two Commissioners and their legal assistants on May 8, 1995, while they were attending the National Cable Television Association Convention. In reporting these *ex parte* communications, the Commission employees indicated that they were unaware at the time that the proceedings were restricted and also stated their belief that none of the persons making the presentations (none of whom were parties to the underlying proceeding) were aware that the proceedings were restricted.

76. Further, on May 15, 1995, the Chairman of General Instrument Corporation ("GIC"), which is also a non-party, made a written *ex parte* submission to all of the Commissioners. One week later, GIC notified the managing Director that, unaware of the proceeding's restricted status, it had made the impermissible written communication.[138] GIC then served copies of its submission on all parties.

77. EchoStar has requested an investigation to determine whether any additional *ex parte* communications oc-

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[137] *See* Letter from William F. Caton, Acting Secretary, to Robert W. Johnson *et al.*, dated May 30, 1995. This notification was made pursuant to and in compliance with Section 1.1212(e) of the Commission's Rules, 47 C.F.R. § 1.1212(e).

[138] *See* Letter from Ronald K. Machtley to Andrew Fishel, Managing Director, dated May 22, 1995.

curred while the proceeding was still restricted and such communications were therefore prohibited under the Commission's rules.[139] Although on May 26, 1995, the Commission issued a public notice changing the status of this proceeding from restricted to non-restricted,[140] and EchoStar subsequently used the opportunity afforded by this reclassification to hold discussions with Commission personnel, EchoStar contends that this "cannot cure the potential harm caused by prior prohibited efforts to influence the process."[141] It therefore requests that the Commission issue an order to show cause why the Commission should not draw inferences adverse to the positions advocated in the *ex parte* communications, as a sanction for violation of the Commission's rules.

78. We see no reason to conduct an investigation into whether additional prohibited *ex parte* communications may have occurred. We note that as soon as Commission personnel learned that the proceeding in question was a restricted matter, appropriate disclosure of the oral contacts was made. We further note that as soon as GIC realized that its written presentation was not permissible under the Commission's *ex parte* rules, GIC itself promptly notified the Managing Director of the com-

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[139] *See* footnote 29, *supra*.

[140] *See* Public Notice No. 54107 (Int'l Bur. May 26, 1995) ("Ex Parte Notice"). Our rules provide that "the Commission retains the discretion to issue public notices setting forth modified or more stringent *ex parte* procedures." 47 C.F.R. § 1.1200(a). In this instance, because the application proceedings raised "complex legal and policy issues" and concerned "rapid developments in the DBS service, the Bureau determined that modification of the *ex parte* rules would "assist the Commission in developing a more complete record on which a well-reasoned decision can be made." Ex Parte Notice at 1. Although EchoStar questions the wisdom of the Bureau's reclassification of this proceeding, we decline to undo the Bureau's reasonable exercise of its discretion.

[141] Letter from Philip L. Malet to Andrew Fishel, Managing Director, dated June 13, 1995, at 3.

munications and served copies of the prohibited presentation upon the parties to the proceeding. In view of these circumstances, we have no reason to believe, and EchoStar has not offered evidence to suggest, that any additional presentations not permitted under the rules have occurred. We therefore deny EchoStar's request for an investigation.

79. We also deny EchoStar's request that we issue an order to show cause why the Commission should not draw inferences adverse to the positions taken in the improper *ex parte* communications. EchoStar has identified two specific arguments that it asserts were made in those presentations: (1) that grant of ACC's applications is necessary to ensure competition to DIRECTV; and (2) that grant of ACC's applications will provide digital programming capability to rural cable systems.[142] We note that the persons who made the prohibited communications were not parties at the time the presentations were made and that, even though they have subsequently attempted to become participants in this proceeding, they have failed to satisfy the requirements for party status.[143] In any event, we are not persuaded that any harmful prejudice has occurred that would warrant the requested sanction. The substance of the prohibited presentations were fully disclosed soon after they were made, similar arguments were made on the record of the proceeding, and EchoStar has thus had a full opportunity to respond to the substance of these claims both orally and in written submissions. We therefore deny EchoStar's request for sanctions.

IV. ORDERING CLAUSES

80. Accordingly, IT IS ORDERED that the Applications for Review filed by Advanced Communications Corporation and Tempo DBS, Inc. are DENIED.

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[142] *See* EchoStar Opp. at 42-43.

[143] *See* ¶ 16, *supra*.

81. IT IS FURTHER ORDERED that the Applications for Review filed by Primestar Partners, L.P., Cable Telecommunications Association, and General Instruments Corporation are DISMISSED for lack of standing.

82. IT IS FURTHER ORDERED that the Motion for Expedited Action filed by Tempo DBS, Inc. is DISMISSED AS MOOT.

83. IT IS FURTHER ORDERED that the Request by EchoStar Satellite Corporation for an investigation into and imposition of sanctions for prohibited *ex parte* communications in this proceeding is DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM F. CATON
Acting Secretary

Separate Statement of
Commissioner Susan Ness

Re: *Advanced Communications Corporation*

By our actions today, the Commission upholds the requirement of due diligence in satellite construction by cancelling the Direct Broadcast Satellite (DBS) permit of Advanced Communications Corporation (Advanced) and expresses its preliminary view that auctions should be used to reassign DBS channels and orbital positions—a solution that is simple and, above all, fairest to all parties.

Failure to Meet Due Diligence

Today's ruling affirms the determination by the International Bureau of lack of due diligence by Advanced. This result is compelled by the evidence before us. In 1991 the Commission granted Advanced's first request for a four-year extension of time to construct a DBS system, but warned that future extension requests for DBS permits would require a showing of concrete progress. I have combed the record, seeking supporting documentation for the proposition that Advanced heeded the Commission's clear warning in 1991. Regrettably, I have found no credible evidence. Advanced never even began construction of a satellite—much less commenced DBS operations —during the four additional years for which the Commission had extended Advanced's initial six-year permit.

In its 1991 order, the Commission stated that "continued reliance on experimentation, technological developments and changed plans will not necessarily justify an extension of a DBS authorization."[1] This admonition applied to all construction permits for which an extension might be sought after 1991. The message should have been especially clear to any party contemplating a request for a *second* extension. Nonetheless, Advanced relies upon

[1] *Advanced Communications Corp.*, 6 FCC Rcd. 2269, 2272, *recon. denied*, 6 FCC Rcd 6977 (1991).

technological developments and changed plans to justify its extension request. An applicant cannot claim it has met every milestone and deadline in a contract for satellite construction, when every meaningful milestone and deadline repeatedly is pushed into the future by contract amendment.

The facts recounted in the Memorandum Opinion and Order establish conclusively, in my mind, the lack of due diligence on the part of Advanced.

Disposition of Returned DBS Orbital Assignments and Channels

Once the factual issue of due diligence is resolved, the more difficult issue becomes the disposition of Advanced's DBS channels and orbital locations. This requires the Commission to weigh a complex array of competing considerations.

Some argued that, notwithstanding a finding of lack of due diligence, the Commission should allow Advanced to transfer its construction permit to a party of its own selection. Others argued that the channels should be publicly auctioned by the Commission to allow all interested parties the opportunity to participate. I have weighed these alternatives carefully but have not been persuaded that the public interest would be served by allowing Advanced to transfer its construction permit to Tempo DBS, Inc. (Tempo).

In particular, I have evaluated claims that allowing the transfer to Tempo will expedite the availability of an alternative supplier of DBS service, that cancelling the construction permit will disrupt business plans of a number of parties, and that recapture and auction of the channels would cause an entrepreneur who showed great vision and contributed significantly to the development of DBS to be left empty-handed. These arguments certainly have some merit. But ultimately I find that they

are outweighed by the need for credible enforcement of our rules and even-handed treatment of potential DBS suppliers.

I have determined that the lack of due diligence requires us to cancel Advanced's permit. I do not believe that a licensee who has clearly failed to comply with Commission rules should be given the right to choose the party to receive its permit, particularly where the demand for the commercially valuable spectrum at issue—twenty-seven full CONUS DBS channels—far exceeds the supply. Tempo's progress toward construction of a satellite for its assigned DBS channels at a different orbital location is not a substitute for Advanced's failures. I believe that the better approach is to make prompt preparations to offer the opportunity to construct and operate a DBS satellite from Advanced's orbital locations to all interested parties.

Conclusion

Although I do not subscribe to the notion that auctions are the best solution in every circumstance, in this instance an auction may be the quickest and fairest means of distributing the channels to those who value them the most. Advanced and Tempo will be free, of course, to bid at an auction. It is my intention to move expeditiously to establish a new method for reassigning DBS channels so that all prospective bidders will have an opportunity to compete. In my judgment, no other approach comports as well with our mandate to serve the public interest.

SEPARATE STATEMENT OF COMMISSIONER RACHELLE B. CHONG

Re: Advanced Communications Corporation, File Nos. DBS-94-11EXT, et al.

I write separately in this matter to set forth my reasons for our decision. This was a perplexing case that required particularly painstaking analysis. There were many legal and factual issues to resolve, and many legitimate interests to balance. I firmly believe that the result that the majority has reached is correct as a matter of law, is fair to all interested parties, and will encourage the swift delivery of additional Direct Broadcast Satellite (DBS) service to consumers. For these reasons, I support the decision.

Due Diligence

I fully support the portion of this decision that concludes that Advanced Communications Corporation ("Advanced") did not meet our due diligence requirements. Section 1 of the Communications Act of 1934 charges the Commission with the job of ensuring United States citizens a "rapid, *efficient*, Nation-wide, and world-wide wire and radio communication service." [1] The warehousing of spectrum by our licensees does not serve to encourage an efficient use of the scarce and valuable public airwaves. The Commission has repeatedly expressed our commitment to discourage spectrum warehousing by methods including enforcement of our due diligence rules.

The Commission's rules at the inception of DBS service were designed to foster this fledging service. Despite some flexibility given to DBS permittees in the early years, however, the Commission did impose a two-part due diligence requirement to which exceptions would be allowed only in the "most extraordinary circumstances." [2] In seven

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[1] 47 U.S.C. § 151 (emphasis added).

[2] Processing Procedures Regarding the Direct Broadcast Satellite Service, 95 FCC 2d 250, 254 (1983) ("[W]e presently believe that

cases, the Commission has enforced its due diligence requirements as to the first prong of the due diligence rule. The instant case implicates the second prong of our due diligence requirement which goes to construction and launch of the DBS system.

The decision sets out in detail all the public statements in which the Commission made clear to all DBS licensees that sufficient progress towards the construction, launch and initiation of a DBS system was required to meet our due diligence rules. In my view, Advanced knew, or should have known, from the Commission's rules and these statements that a DBS permittee was required to make reasonable progress toward construction and launch of its DBS system in order to maintain its authorization.

Upon careful review of the record in this case, it is apparent to me that, while Advanced did make some effort to promote the DBS concept and participate in legislative, regulatory and publicity efforts to promote DBS development, it was not making adequate efforts to actually construct, launch and initiate its DBS system. It is the latter and not the former that our rules require. Thus, it is my belief that the due diligence finding in the decision was correct under both our rules and caselaw.

Remedy

Having concluded that Advanced did not meet its due diligence obligations, the next issue became how best to proceed. In my view, when a DBS permittee fails to meet its due diligence requirements, the appropriate remedy is for the government to recover the channels and orbital slots assigned to that permittee and make them available to others who are committed to using them to serve the public interest. To do otherwise would allow permittees

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only a showing of the most extraordinary circumstances would warrant consideration of any request by a . . . permittee for an extension of the due diligence requirement beyond July 17, 1984.").

to improperly warehouse spectrum. Again, given the increasing demand for spectrum, a conscientious Commission simply should not allow spectrum to lie fallow.

We recognize in this order that our method of reassigning these channels should take account of the *current* state of the DBS industry and our regulatory authority. With this in mind, I find the reassignment method set forth in our 1989 *Continental* decision [3] unsatisfactory. Much has changed since the Commission adopted that order six years ago. The DBS industry has moved well beyond its nascent stage with two DBS providers in the sky. Moreover, the development of digital technology has expanded the potential uses for this spectrum. The record in this proceeding further demonstrated that there are many entities who stand ready, willing and able to take these channels and bring DBS service to the public swiftly.

Further, in 1993, Congress granted this agency authority to choose licensees through auctions. We have successfully used auctions to grant licenses in other services. We have found that auctions are an efficient and effective means of licensing that brings service to the public quickly by those who have the financial wherewithal to provide service in the marketplace. The auction approach also produces a tangible monetary benefit for the American public for the use of the public resource by the licensee. Such benefits should not be overlooked.

Given these changes, I believe that it is incumbent on the FCC to consider carefully how best to reassign the channels recovered from Advanced. While I recognize that some argue that there could be additional delay associated with recovery of the spectrum and reassigning

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[3] Continental Satellite Corp., 4 FCC Rcd 6292 (1989), partial recon. denied, 5 FCC Rcd 7421 (1990). In *Continental*, the FCC stated that it would distribute any recovered channels among other permittees, up to the number of channels requested in their applications. 4 FCC Rcd at 6299.

the channels, I believe that the delay can be minimized by the commitment we make to act quickly. Though a difficult decision, it is my view that this is the correct and fairest decision.

DISSENTING STATEMENT OF COMMISSIONER ANDREW C. BARRETT

In Re: Advanced Communications Corporation Application for Extension of Time To Construct, Launch, and Operate a Direct Broadcast Satellite System; Application for Consent To Assign Direct Broadcast Satellite Construction Permit from Advanced Communications Corporation to Tempo DBS, Inc.; Application for Modification of Direct Broadcast Satellite Service Construction Permit (File Nos. DBS-94-11EXT, DBS-94-15ACP, DBS-94-16MP).

Pursuant to today's action, the Commission affirms the International Bureau's ("Bureau") determination that Advanced Communications Corporation ("ACC") failed to meet its due diligence obligation of proceeding expeditiously with the construction and launch of its direct broadcast satellite ("DBS") system.[1] As a result, the channels and orbital locations previously assigned to ACC will revert to the public for reassignment. Further, the Commisison has chosen to initiate a rule making to establish a new methodology by deciding upon mutually exclusive applications for the reassignment of DBS channels and orbital positions. As a result of my disagreement with the Commission's due diligence findings in this case, I feel compelled to dissent from today's decision.

In the past when reviewing due diligence efforts by DBS permittees, the Commission has heretofore granted extensions to several permittees in an effort to encourage the delivery of DBS service to the public. To that end, over the years, the Commission has exercised greater flexibility when reviewing the due diligence criteria for various DBS permittees, even though these somewhat relaxed expectations may have proven unacceptable for other video programming providers in the marketplace. It would

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[1] *Advanced Communications Corp.*, 77 Rad. Reg. 2d (P&F) 1160 (DA 95-944, April 27, 1995).

therefore, in my opinion, seem entirely unreasonable, and indeed, irresponsible, for the Commission to disregard its primary objective—to encourage competition amongst DBS providers in order to enhance consumer choice—by forestalling yet another viable and prepared DBS competitor from entering the marketplace in the immediate future.

The Commission's due diligence requirements have two components. First, the Commission requires that a DBS permittee begin construction or complete contracting for construction of the satellite station within one year of the grant of its construction permit. Secondly, the permittee must begin operation of the satellite station within six (6) years of the grant of its permit, unless otherwise determined by the Commission.[2]

In denying ACC's request for an extension, the Bureau concluded that, from its assessment of the totality of the circumstances, ACC had made little progress in the construction, launch and initiation of a DBS system in the past decade. The record indicates that in 1984, the Commission granted ACC's application for authority to construct and launch a DBS system, subject to its fulfillment of the Commission's due diligence requirements. In October 1986, the Commission found that ACC had complied with the first due diligence component by contracting for the construction of its first two DBS satellites. As a result, the Commission granted ACC's request for sixteen (16) channels at each of two orbital locations. In addition, ACC requested additional channels at these locations as part of its modification application. The Commission reserved, but did not assign, eleven (11) additional pairs of channels for ACC conditioned upon ACC's satisfaction of the first prong of due diligence. In February 1990, Advanced applied for a four year extension of time to construct and operate its DBS system. The Commission granted this request in April 1991 (ex-

[2] *See* 47 C.F.R. § 100.19(b).

tending the deadline to December 7, 1994), and assigned ACC nineteen (19) additional channels. Importantly, as the record indicates, ACC did not receive its final channel assignments until April 1991. Therefore, I believe it is imperative that we focus our review on ACC's actions subsequent to that date.

Despite ACC's efforts in developing its DBS system, to wit: ACC's failed negotiations for a joint venture with another DBS permittee, Echostar Satellite Corporation ("Echostar") as well as its contractual agreement with Tempo DBS, Inc. ("Tempo")[3] for the construction and launch of a satellite, the Bureau concluded that these actions did not amount to the actual construction of a DBS satellite or arrangement for the launch and operation of DBS service. I am puzzled as to why the Bureau determined to apply a different set of criteria for ascertaining due diligence than were used for other permittees with respect to the launch of service in reaching its finding that ACC had not met the due diligence requirements.

I do not believe that ACC's efforts are patently distinguishable from the efforts made by those permittees in cases in which the Commission either granted an extension request or a transfer of control application. For example, in July 1991, United States Satellite Broadcasting, Inc. ("USSB") filed an extension request and a minor modification of its construction permit concerning its authorization to operate a DBS satellite on five (5) channels at a specific orbital location. In its minor modification application, USSB stated that it had entered into an agreement with another entity, Hughes Communications Galaxy, Inc., ("Hughes"), to purchase a payload of five (5) transponders. Significantly, these transponders were not on one of USSB's constructed and launched satellites, but on one of Hughes' satellites, to be located at the same orbital location as USSB's channels. As a result, USSB

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[3] Tempo DBS is an affiliate of Tele-Communications, Inc. ("TCI").

sought authority to implement its five (5) channel service by utilizing five (5) transponders on one of Hughes' satellites rather than constructing and launching a separate five-channel GE Astro-Space satellite as previously proposed and approved.[4] In addition, USSB sought to modify the technical specifications of its authorization to conform to the specifications of the Hughes satellite. It should be noted that USSB's DBS system was required to be in operation by December 1992, while Hughes' system was not required to be in operation until December 1994. As a result, USSB requested that its completion date be reconciled with that of Hughes. In that case, the Commission applied an analysis that led to the conclusion that the ultimate goal of service to the public would be advanced by a grant of USSB's request for extension of time.[5]

In this *Order,* the Commission also concludes that ACC's due diligence efforts were different from those of Directsat Corporation ("Directsat").[6] I am not persuaded by the Commission's findings. Directsat received its DBS construction permit in August 1989. The Commission determined that Directsat had satisfied the first due diligence requirement in November 1993 and accordingly assigned it ten (10) channels. Only five months later, Directsat sought approval for transfer of control of its permit to Echostar's parent company. Interestingly, Echostar held eleven (11) channels at the same location as those held by Directsat. The Commission granted that authorization in November 1994.[7]

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[4] *See In re Applications of United States Broadcasting Company, Inc.*, 7 FCC Rcd 7247, 7249 (1992).

[5] *Id.* at 7250.

[6] *See In re Application of Directsat Corporation and Echostar Communications Corporation*, 10 FCC Rcd 88 (1994).

[7] It should also be noted that Directsat was permitted to profit from its sale of the permit. Because of my unwillingness to support our finding of no due diligence here, I am persuaded that ACC should have been afforded the same opportunity.

It appears that the Commission credits Directsat for negotiating and consummating a transaction with Echostar in a much more expeditious fashion than ACC. While I acknowledge that an uncertain business situation, or an unfavorable business climate in general have not been adequate explanations for failure to meet a construction timetable,[8] I do believe that, under these circumstances, the Commission must remain cognizant about the practicalities of the marketplace. A period of lengthy negotiations does not necessarily denote a clear intention to delay. Indeed, negotiations between Echostar and ACC failed within one (1) year of the grant of ACC's April 1991 extension. Clearly, the negotiations between ACC and Echostar involved a substantial transaction that finally resulted in protracted litigation. As evidenced by the record, both parties proceeded to conduct negotiations with other parties. Unfortunately for ACC, such events transpired near the expiration of its construction permit. On the other hand, we note that Directsat immediately consummated a deal with Echostar. What the Commission fails to acknowledge is that Directsat and Echostar had the same orbital location and thus derived the benefit of economic efficiencies. On the other hand, the Commission also fails to note that negotiations between Tempo and ACC advanced to the point where Tempo began to commence construction of its satellites to accommodate the 110° orbital location.[9]

Although the Commission in the instant *Order* seeks to elaborate on various differences between ACC's and USSB's and Directsat's actions, I am not wholly persuaded that the distinctions are as obvious as espoused. In my view, a review and analysis of the Gordian knot of issues in this case will reveal certain distinctions. For

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[8] *See In re Applications of United States Broadcasting Company, Inc.*, 3 FCC Rcd 6858, 6859 (1988).

[9] I make this observation only for purposes of demonstrating an intention by the parties to proceed with a DBS system without undue delay.

instance, one may argue that the public would have also benefited from the sale of ACC's permit to Tempo by increasing the choice of DBS providers. Therefore, I do not believe that ACC's efforts are substantially incongruent with those of USSB and Directsat so as to warrant a finding of no due diligence and the revocation of ACC's permit.

By comparison with the other pertinent instances, I am not convinced that ACC did not satisfy the due diligence requirements. Unfortunately, I believe that Commission precedent in this area is murky enough so as to elicit persuasive arguments in this case for both sides. Based on the public policy concerns, however, it is clear that the Commission, in the past, gave DBS permittees greater flexibility, based on the fact that DBS service was a relatively fledgling industry in which there were very few players and in the interest of making DBS service available to the public. As a result, until such time as the Commission had established and clearly stated a definitive and inflexible approach to the due diligence standard, I believe the Commission should have used a similar basis for determining ACC's due diligence compliance. As a consequence, I would have approved an assignment of ACC's permit to Tempo.

REASSIGNMENT OF CHANNELS

The Commission has announced that it intends to initiate an expedited rulemaking proceeding to establish a new methodology for reassigning DBS channels and orbital positions. Based on the assumption that auctions will be used to reassign the reverted channels, the Commission has proposed to hold the DBS auction within the next three (3) months. Based on the Commission's past experiences with auctions and the complexities involved in developing acceptable service and auction rules, I firmly believe that such a timetable is wholly unrealistic. Moreover, I am convinced that today's decision as well as

any rules promulgated for auctions in this service will be subject to judicial challenge that will considerably delay additional DBS service to the public.

The Commission has, on prior occasions, indicated that one of its primary goals in the DBS area is to promote the prompt initiation of DBS service. Although I am loathe to prejudge a rulemaking for reassignment of the reverted channels, I am skeptical about the Commission's timetable for establishing a new methodology for the reassignment of DBS channels that will not further delay service to the public. Therefore, I will review the comments for the rulemaking which will be initiated in the immediate term with great interest.

DISSENTING STATEMENT OF COMMISSIONER JAMES H. QUELLO

In its decision today, the majority has changed the DBS due diligence rules in the middle of the game, unlawfully and unfairly disadvantaging an innocent participant. By a slim majority indicative of the difficult factual, legal and policy issues before us, the Commission has affirmed the International Bureau's finding that Advanced Communications Corp. failed to meet its due diligence obligation in the construction and launch of its DBS system. The result: Advanced's construction permit has been cancelled, its application to assign its DBS construction permit to Tempo has been dismissed as moot, and the channels and orbital locations previously assigned to ACC will likely be auctioned to the highest bidder. The practical public interest result of the majority decision: the future of a small cable operator "headend in the sky" has been jeopardized; the date for the arrival of first-ever DBS service to Alaska and Hawaii is unclear; and additional multichannel video programming competition from another DBS provider will be delayed.

Because this decision demonstrates a lack of understanding of the history of the DBS service, and because it fundamentally misapplies Commission precedent, I respectfully dissent.

The History of the DBS Service

I find it interesting that the two dissenters in this case are the two senior Commissioners at this Agency. In my view, this is no coincidence. My colleague and I have experienced firsthand the growing pains of a fifteen-year-old satellite service that many experts and pundits long ago wrote off as a technology that would never make it from the drawing board into the home. This skepticism was not without some foundation, given the substantial developments in DBS satellite technology, changes in Commission policy regarding channel and orbital assignments,

and the Challenger and Ariane launch vehicle failures of the late 1980's, all of which necessitated changes in business plans, expenditure of additional funds, and delay. Moreover, my colleague and I have served on this Commission when it bravely refused, despite the dire predictions of these "experts," to abandon an industry that promised to offer subscribers an alternative to cable service.

It is this firsthand experience, together with the fact that the DBS industry is only beginning to become a viable and competitive service, that highlights to me the absurdity of the majority's decision to execute one of the survivors of this brush with marketplace death. As a veteran, this strikes me as somewhat akin to rewarding a survivor of the Charge of the Light Brigade by putting him in front of a firing squad.

Lest we inhibit the viability of a service that still needs relief from undue regulatory constraints that could inhibit its growth—and by growth I mean the growth of a service that includes numerous DBS providers that can compete with each other as well as with other multichannel video programming providers—this Commission should have continued to apply its due diligence requirements in an even-handed and forward-thinking manner. Sadly, this goal will not be achieved. The decision by the majority in this case assumes that, because two DBS providers (including one owned by the largest corporation in America in 1994) launched service from a shared satellite in October of 1994, this service has "arrived." This rationale leads the majority to conclude that extensions of time can be denied, willy nilly, and that recovered spectrum should be auctioned off to anyone with a pocket deep enough to jump onto the DBS bandwagon late in the parade. This result is patently unfair to Advanced and the other DBS licensees and permittees who invested time and money 15 years ago when the possibilities that this service would become viable were minimal, at best.

Moreover, this result, despite the ambitious timetable set by the majority, will result in further delays in the initiation of service by new DBS providers.

The Commission's Due Diligence Requirement

In ruling on a request for extension of a DBS construction permit, the Commission considers "[t]he totality of the circumstances—those efforts made and those not made, the difficulties encountered and those overcome, the rights of all parties, and the ultimate goal of service to the public." *USSB I*, 3 FCC Rcd 6858, 6859 (1988). In short, the Commission must weigh the delay in scheduled implementation of service against the claimed public interest benefits. *USSB II*, 7 FCC Rcd 7247, 7249 (Vid. Svc. Div. 1992).

The majority in this case finds that Advanced does not merit an extension because it made little progress toward construction, launch, and initiation of a DBS system, despite passage of "more than a decade, including one four-year extension of time." Majority Op. at para. 2. However, I believe that the efforts of Advanced were fully consistent with Commission precedent, and that the delay in service that will inevitably result from denial of Advanced's extension request will far exceed the minimal delay that would have resulted had Advanced's extension request and application for assignment of its construction permit to Tempo been granted. Had the Advanced/Tempo deal been allowed to proceed, a DBS satellite would likely have been launched in April 1996. One has only to look at the history of decisionmaking at this Agency to realize that it will only be through extreme luck bordering on divine intervention that the unrealistic timetable set forth in the majority decision is likely to be achieved. That decision anticipates that a major change in the policy for the reassignment of recovered channels, adoption of auction rules, and the completion of an auction, can all be finalized within the next three months.

Turning to the due diligence showing of Advanced, it is important to note that the **only** period relevant to the Commission's decision in this case is the four-year period following the grant of Advanced's first extension request, not the entire ten-year period since Advanced was granted a construction permit. The Commission previously ruled on Advanced's efforts during the initial six-year period following grant of a construction permit and that decision is not before us here. During this six-year period Advanced, like other DBS providers, failed to commence operation of its system because the Commission's initial six-year construction milestone proved to be unrealistic. As the majority opinion recognizes, provision of DBS service was not feasible for the first six years that Advanced held its permit for the reasons I delineated above: substantial developments in DBS satellite technology, changes in Commission policy regarding channel and orbital assignments, and the Challenger and Ariane launch vehicle failures.

As to Advanced's efforts during the four years since its first extension was granted, it is relevant to note that Advanced did not receive its full complement of frequencies and orbital positions until April of 1991, in a decision that did not become final until November of 1991. The Commission has stated in two recent decisions that it is unrealistic to expect permittees to begin construction until the Commission has awarded them specific orbital slots and channels. See *Continental Satellite Corp.*, 4 FCC Rcd 6292 (1989), *partial recon. denied*, 5 FCC Rcd 7421 (1990); *Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680 (1993), *recon. denied*, FCC No. 95-421 (Oct. 5, 1995). Therefore, for the first year of its four-year extension period, Advanced cannot have been expected to have demonstrated progress toward construction.

So we come down to the issue of what Advanced did, or did not do, between 1992 and 1995. In examining Advanced's efforts during this period, one must look to

Commission precedent in which other DBS permittees have been granted extensions with showings similar to Advanced's. None of these extension requests were denied. While it cannot be argued that there are no distinctions between the due diligence showings of Advanced and the DBS applicants whose extension requests were granted, painted on a precedential backdrop in which the Commission stated that its regulatory priority was fostering the development of a fledgling service, they constitute distinctions without a difference.

In a decision adopted in January of this year, the Commission approved Directsat's for-profit sale of its construction permit for an unbuilt DBS system to EchoStar. *Directsat Corp.*, 10 FCC Rcd 88 (1995). The Commission reasoned that for-profit sales of permits can be allowed in the DBS service because of the presence of our due diligence rules, which suffice to prevent warehousing of spectrum. *Id.* at 89. The Commission thus noted in *Directsat Corp.* that a significant amount of money had been invested in satellite construction and that construction milestones had been met. At the time the Commission approved the transfer, however, Directsat had expended 0.13% of the contract price for the construction of satellites and the construction phase of its satellites had not even begun. *See* Directsat Semi-Annual Progress Report, Exhibit E to Contract Modification No. 7, filed August 16, 1994.

Unfortunately, the majority in this case refused to attribute Tempo's investment and construction progress to Advanced, even though the Commission earlier this year had attributed Echostar's investment and construction progress to Directsat. Moreover, despite waxing eloquent for several pages, the majority fails to adequately explain why Advanced's showing is decisionally less significant than Directsat's in light of Directsat's August 1994 Progress Report. Specifically, the majority fails to note that, at the time their assignment applications were filed,

Directsat had expended a mere 0.13% of the contract price and that this constituted due diligence; whereas Advanced's payments on its satellite contract were deficient because they amounted to less than one percent of the contract price. The majority also fails to note that the actual dollar amount expended by Advanced was later specified in a letter filed in the record dated September 19, 1995, as $7-8 million. The actual dollar amount expended by Directsat prior to its merger with Echostar, while not set forth in the majority opinion or in Directsat's 1994 Progress Report, is likely significantly less than the amount expended by Advanced.[1]

The majority attempts instead to distinguish the Advanced case from *Directsat Corp.* by claiming that Directsat requested only a transfer of its construction permit, not an extension of time to construct. Directsat's DBS authorization, however, expired on August 15, 1995, and EchoStar has applied for an extension. That EchoStar would require an extension was apparent at the time Directsat filed its transfer application. Moreover, the Commission in *Directsat Corp.* felt compelled to comment on Directsat's progress toward construction of its DBS system, a comment that presumably would have been unnecessary had the Commission felt that Directsat's due diligence was irrelevant. The key difference, then, between Directsat and Advanced appears to be the order in which the extension and transfer applications were

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[1] The majority makes much of Advanced's "fail[ure] to specify how much money it actually invested in the construction of its satellites." Majority Op. at para 50. Apparently, the majority is unaware of the September 19, 1995, letter filed by Advanced as part of the record in this proceeding in which it revealed that $7-8 million was paid toward construction of its satellites. Moreover, it is interesting to note that Commission rules do not require a permittee to reveal the actual amount it has invested in its satellite system; rather the rules require that the permittee reveal what percentage of the satellite cost it has invested. Advanced, like Directsat, fully complied with this requirement in filing its progress reports with the Commission.

submitted. This distinction without a difference should not be the key factor in determining the fate of a DBS permittee, and the majority offers no reason why it should be of decisional significance.

In 1991, the Commission granted a second extension of a permittee's construction permit in light of its contract to use satellites provided by a competitor. *USSB II*, 7 FCC Rcd at 7251. The Commission based its extension on the fact that the permittee, USSB, had complied with due diligence requirements by contracting to use transponders on a satellite designed, built and launched by DIRECTV. In fact, this Commission has maintained that DBS service will be expedited if DBS permittees "are free to seek Commission approval to combine assignments and resources through merger or buyout." *Continental Satellite Corp.*, 4 FCC Rcd. at 6299 (1989). Like USSB and Directsat, Advanced heeded the Commission's admonition to proceed diligently by entering into a binding, noncontingent contract with Tempo DBS for delivery of satellites, but the Commission refused to credit Advanced with the construction progress made on the Tempo satellites. Significantly, Tempo DBS's contract to finance Advanced's satellite launch was not contingent on the transfer of channels.

The majority, in distinguishing *USSB II* and the case involving Advanced, points out that it considers "the lack of ongoing involvement a key distinction between these two cases." Majority Op. at para. 53. While in *USSB II* the ongoing involvement of USSB is clear, such "ongoing involvement" is less clear in *Directsat Corp.*, where Directsat transferred control of its DBS authorization to the parent company of Echostar. Is "Directsat" still involved in the DBS business, or is it involved in name only? In my experience, when one company is bought out by another company, the company purchased is either eliminated entirely, or continues in name only under the complete control of the buyer. Again, the majority is, in my

view, relying on a distinction without a difference in deciding to deny Advanced's extension request for this reason.

In conclusion, the majority has decided this case without taking full account of the history of this fledgling satellite service. Moreover, the majority has set up a series of tenuous and tortured distinctions without any difference in claiming that Advanced's situation is markedly different from that of other permittees in cases with remarkably similar facts. As a result, the majority gives companies that chose to sit out the hard developmental days of DBS a windfall chance to participate in a gold rush, and leaves one of the pioneers of the DBS service with only a panful of mica. This result squares with neither the law nor with equity, and therefore I dissent.

APPENDIX D

DA 95-944

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF

ADVANCED COMMUNICATIONS CORPORATION

File Nos. DBS-94-11EXT

APPLICATION FOR EXTENSION OF TIME TO CONSTRUCT, LAUNCH AND OPERATE A DIRECT BROADCAST SATELLITE SYSTEM

DBS-94-15ACP

APPLICATION FOR CONSENT TO ASSIGN DIRECT BROADCAST SATELLITE CONSTRUCTION PERMIT FROM ADVANCED COMMUNICATIONS CORP. TO TEMPO DBS, INC.

DBS-94-16MP

APPLICATION FOR MODIFICATION OF DIRECT BROADCAST SATELLITE SERVICE CONSTRUCTION PERMIT

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1995 Released: April 27, 1995

By the Chief, International Bureau:

I. INTRODUCTION

1. For more than a decade, Advanced Communications Corporation ("Advanced") has had leave to provide the

public with Direct Broadcast Satellite (DBS) service. It has had allocated to it scarce public resources—orbital positions and channels—so that it could provide that service. Advanced paid nothing for these resources. It was obligated only to proceed with due diligence to provide the service it promised. After more than a decade, Advanced has not provided—and is not close to providing—DBS service to the public. It has failed to meet its due diligence obligation. Advanced must now return the public resources it holds to the public so that these resources can be put to use by others.

2. Advanced has filed an application for a second four-year extension of time in which to construct, launch, and initiate service from its DBS system. Advanced has also filed an application for consent to assign its construction permit to Tempo DBS, Inc. (Tempo DBS). Finally, Advanced has applied for authority to modify its construction permit to allow it to substitute satellites now being constructed for Tempo Satellite, Inc.[1] Dominion Video Satellite, Inc. (DVS), EchoStar Satellite Corporation (EchoStar), DIRECTV, Inc. (DirecTV), and Directsat Corporation filed objections to Advanced's applications; Tempo Satellite and Nevada Direct Broadcasting System (Nevada) filed supporting comments. Advanced filed replies to the objections.[2]

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[1] Tempo Satellite, Inc. ("Tempo Satellite") is a subsidiary of Tele-Communications, Inc. ("TCI"), a cable operator, authorized to construct, launch, and operate 11 DBS channels at orbital slots 166° W.L. and 119° W.L. *See* Tempo Satellite, Inc., 7 F.C.C. Rcd 2728 (1992). Tempo DBS, the proposed assignee, is an affiliate of TCI.

[2] Several of the pleadings submitted by the parties were not timely filed or were not authorized under the Commission's rules. *See* 47 C.F.R. § 1.45. Such pleadings shall only be considered as informal requests for Commission action or informal comments. *See* 47 C.F.R. § 1.41. The parties' requests for extension of time are hereby denied.

3. Advanced has had over ten years, including one four-year extension, in which to construct and launch its DBS system. It has failed to do so. It has thereby failed to meet the Commission's due diligence rules—imposed a decade ago—to ensure that the public receives prompt DBS service. In the meantime, the channels and orbital positions assigned to Advanced have gone unused. Other DBS licensees have already begun operations.

4. Only by enforcing the progress requirements of the Commission's rules can we ensure that allocated resources will be efficiently and expeditiously put into productive use. In the past, we have given DBS permittees latitude in meeting due diligence deadlines in order to ensure the development of DBS services. As the Commission has previously stated, however, such latitude is not appropriate in an era in which DBS licensees are successfully operating and are competing for subscribers. Accordingly, we deny Advanced's application for an extension of time and declare its construction permit null and void. We dismiss, as moot, the pending assignment and modification applications.

II. BACKGROUND

5. In 1984, Advanced applied for authority to construct and launch a DBS system as part of the second processing round of DBS applications. The Commission granted the application subject to the condition that Advanced "proceed with the construction of its system with due diligence as defined in Section 100.19(b) of the Commission's rules." 47 C.F.R. § 100.19(b).[3] The due

[3] Satellite Syndicated Systems, Inc., 99 F.C.C. 2d 1369 (1984). Advanced's initial grant authorized it to provide service from two satellites, each to deliver six channels to half of the continental United States. Advanced subsequently applied for, and was granted, authority to increase the number of satellites in its system to five, and was later granted authority to increase the number of channels to 27. *See* Continental Satellite Corporation ("Continental"), 4 F.C.C. Rcd 6292 (1989).

diligence requirement has two components. First, the DBS permittee must begin or complete contracting for construction of its satellite within one year of the grant of its construction permit. Second, the permittee must begin operation of the satellites within six years of the grant of its construction permit, unless otherwise determined by the Commission. Section 100.19(b) provides that a transfer of control of the permit is not a justification for extension of either of these deadlines. Orbital positions and channels are not assigned to a DBS permittee unless and until it demonstrates that it has fulfilled the first component of the due diligence requirement. *Processing Procedures Regarding the Direct Broadcast Service*, 95 F.C.C. 2d 250, 253 (1983).

6. In October 1986, the Commission found that Advanced had complied with the first component of the due diligence requirement by contracting for the construction of its first two DBS satellites. Advanced was ultimately assigned to the 110° W.L. orbit location (channels 1-23, 25, 27, 29, 31) and 148° W.L. (channels 1-17, 19, 21, 23, 25, 27, 29, 31).[4] In February 1990, Advanced applied for a four-year extension of time, until February 1994, in which to construct and operate its DBS system. The Commission granted this request, extending the deadline until December 7, 1994.[5]

7. In August 1994, Advanced applied for another four-year extension of time, until December 1998, in which to construct and operate its system.[6] In September 1994, Advanced filed an application for consent to assign its construction permit to Tempo DBS.[7] In October 1994,

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[4] Tempo Enterprises, Inc. ("Tempo"), 1 F.C.C. Rcd 20 (1986).

[5] Advanced Communications Corp. ("Advanced"), 6 F.C.C. Rcd 2269 (1991).

[6] Request for Additional Time to Construct and Launch Direct Broadcast Satellites, DBS-84-01/94-11EXT (August 8, 1994).

[7] Request for Consent to Assign DBS Authorizations, DBS-94-15ACP (September 28, 1994).

Advanced filed an application to modify its construction permit to change the technical design of the Advanced satellites to duplicate the design of satellites then under construction for Tempo Satellite under a separate DBS authorization.[8]

8. Dominion, EchoStar, and Directsat oppose Advanced's extension request. They contend that Advanced has not met the first component of the due diligence requirement because Advanced's contract with Martin Marietta does not meet due diligence requirements, delays in construction were not due to circumstances beyond Advanced's control, and Advanced has "warehoused" its authorized frequencies. They argue that Advanced has no valid construction permit and that Advanced's applications for assignment and modification should be declared moot. Directsat and Echostar maintain that Advanced failed to initiate operation due to business decisions within its control, that Commission precedent precludes grant of an extension of time request based on Advanced's failure to attract investors, and that grant of the extension request would prejudice permittees who have significantly passed Advanced in progress toward initiation of DBS service. Dominion argues that under Commission rules, transfer of control of an authorization does not warrant grant of a request for extension of time.[9]

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[8] Application for Modification of Construction Permit, DBS-94-16MP (October 14, 1994). In November 1994, Advanced filed an amendment to this modification request. Amendment of Application for Modification of Construction Permit, DBS-94-16MP (November 16, 1994).

[9] 47 C.F.R. § 100.19(b) states that "[t]ransfer of control of the construction permit shall not be considered to justify extension of the[] deadline[]."

III. DISCUSSION

Extension Request

9. In adopting rules and policies for DBS service, we determined that a due diligence requirement would ensure that permittees would go forward expeditiously.[10] Accordingly, Section 100.19(b) of the rules for DBS service, 47 C.F.R. § 100.19(b), states that transfer of control of the construction permit will not justify extension of due diligence deadlines. We later noted that "the rule was intended to ensure the prompt initiation of DBS service for the public, and must be enforced where permittees are allowed to hold spectrum resource for which other applications exist. . . ." [11]

10. During the "pioneering era" of DBS technology in the 1980's, the Commission granted numerous extensions of due diligence milestones. The Commission was reluctant to cancel construction permits where permittees failed to initiate DBS service "in accord with a preestablished timetable set without the benefit of experience." [12] As technology developed, however, the Commission gave permittees notice that they could not expect additional extensions. We said in 1988, "[a]s circumstances have evolved and demand for DBS facilities may be increasing beyond the available supply of orbit/channel resource[s], there does now appear [to be] a need for stricter enforcement of the construction progress requirements of the DBS rules." [13]

11. In ruling on requests for extensions of time, the Commission has stated that "[t]he totality of circum-

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[10] Inquiry into the development of regulatory policy in regard to Direct Broadcast Satellites for the period following the 1983 Regional Administrative Radio Conference, 90 F.C.C. 2d 676 (1982).

[11] CBS, Inc., 99 F.C.C. 2d 565, 572 (1984).

[12] United States Satellite Broadcasting Company, Inc. ("USSB I"), 3 F.C.C. Rcd 6858, 6860 (1988).

[13] *Id.* at 6861.

stances—those efforts made and those not made, the difficulties encountered and those overcome, the rights of all parties, and the ultimate goal of service to the public—must be considered." [14] In granting Advanced's 1990 extension, the Commission relied on the substantial developments in DBS satellite technology, the Commission's development of its policy regarding channel and orbital assignments, and the Challenger and Ariane launch vehicle failures of the late 1980's.[15] The Commission warned, however, that "continued reliance on experimentation, technological developments and changed plans will not necessarily justify an extension of a DBS authorization." It further warned that it would "closely scrutinize all requests for extension of time within which permittees must initiate DBS service." [16]

12. Advanced asserts that a second extension is justified under the Commission's rules (and is consistent with similar extensions previously granted) because it has made "considerable efforts" to develop DBS service, it has pursued a joint venture agreement, and any delays have been due to circumstances beyond its control. Advanced also implies that the progress Tempo Satellite has made in constructing its satellites should be attributed to Advanced and that these efforts constitute a "proper showing" on which to base an extension.

13. Advanced first argues that an extension is warranted in light of its efforts to reach a joint venture agreement over a nearly three-year period beginning in 1992, even though these negotiations ultimately failed.[17] The

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[14] *Id.*

[15] *Id.* at 6860.

[16] *Id.*

[17] In progress reports to the Commission, Advanced said, in April 1992, that it expected negotiations to be completed in "the next month or two." In August 1992, Advanced reported it had signed a letter of intent that called for execution of an agreement within

Commission has previously found that on-going negotiations do not justify an extension of due diligence milestone.[18] Failed negotiations surely should fare no better. In denying an extension to another DBS permittee, we held that "failure to attract investors, an uncertain business situation, or an unfavorable business climate in general have never been adequate excuses for failure [to] meet a construction timetable in other satellite services." [19]

14. Advanced also asserts that construction was delayed because it needed to modify its system design. In granting Advanced's first extension request, however, the Commission advised Advanced that its decision to modify its technical proposal was a business decision wholly within its control that would not generally excuse its failure to meet the due diligence requirement. To conclude otherwise would allow permittees to "extend indefinitely their nonperformance by repeated modifications of their proposals." [20] DBS technology has evolved to the point where permittees can make design decisions and proceed with construction with relative assurance that their system will be technologically competitive when it is launched. In fact, two permittees have launched DBS systems, which are both already providing service.[21] Advanced has not explained why it did not make similar design decisions for its system, or why such decisions were not wholly

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sixty days. In October 1992, Advanced explained that negotiations were continuing, and in April 1993, stated it expected to reach an agreement within the next month. In May 1993, it reported it was still in "complex negotiations," and in October 1993, it claimed that negotiations were continuing. However, on December 30, 1994, Advanced indicated that negotiations had failed.

[18] USSB I, 3 F.C.C. Rcd at 6859. *See also* Report and Order in CC Docket No. 81-704, 54 RR 2d 577, 597 n. 62 (1983).

[19] *Id.*

[20] Tempo, 1 F.C.C. Rcd at 20.

[21] *See, e.g.*, Semi-Annual DBS Progress Report filed by Hughes Communications Galaxy, Inc., DBS-84-02/81-07/93-03MP (January 24, 1995).

within its control. Accordingly, we do not find that continued modifications to Advanced's system warrant an extension of time.

15. Advanced further contends that an extension is justified because the company has expended considerable funds and "countless hours" to implement its system. Advanced asserts that the Commission has granted extensions under similar circumstances, citing *United States Satellite Broadcasting Company, Inc.*[22] In that case, the Video Services Division of the Mass Media Bureau, in considering the "totality of the circumstances," found that the permittee, USSB, (1) had expended $23 million, including a substantial payment towards spacecraft construction; (2) had demonstrated that the remaining financing for the completion and launch of the satellite had been arranged; and (3) had executed launch and various supplier contracts. Advanced, in contrast, has not specified how much money it has spent,[23] has not arranged financing, and has not procured a launch contract. Advanced has failed to show its progress constitutes sufficient justification for a further extension of time. To the contrary, it appears that Advanced wants to abandon its business to Tempo DBS.

16. Advanced further states that it should be granted an extension because it has "remained in due diligence" since we found it had met the first component of the due diligence requirement by executing a construction contract. The facts belie this conclusory assertion. The due diligence requirement consists of two components. The fact that Advanced continues to have a binding construc-

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[22] United States Satellite Broadcasting Company, Inc. ("USSB II"), 7 F.C.C. Rcd 7247, 7250 (1992).

[23] Advanced acknowledges that its expenditures on the construction contract with Martin Marietta Astrospace are less than one percent. Semi-Annual Status Report, DBS 84-01-88-05 MP and 84-01/88-05 Ext. (May 10, 1993). Subsequent reports do not include payment amounts or percentages. *See* Semi-Annual Status Reports, DBS 84-01-88-05 MP and 84-01/88-05 Ext. (October 6, 1993 and April 24, 1994).

tion contract, or that it has made all payments required by this contract does not excuse its failure to meet the second part of its due diligence requirement: operation of its direct broadcast satellite system.[24] Meeting the first due diligence requirement does not justify failing to fulfill the second.

17. Advanced also asserts that the Commission's formulation of its channel assignment policy[25] and the delay in granting previous modification requests constitute circumstances beyond its control and warrants an extension of time. However, the channel assignment policy was clarified in 1989.[26] Advanced's proposed modifications to its orbit locations and channel assignments were granted in 1991.[27] Advanced has not cited any circumstances that impeded its ability to construct its system over the last four years. Advanced has failed to show that delay in meeting the second component of due diligence is due to circumstances beyond its control.

18. Finally, Advanced asserts that an extension of its construction permit would be in the public interest, since it is on the threshold of an advanced DBS system which will benefit the public, and because doing so will promote

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[24] USSB II at 7250. To the extent Advanced relies on its contract with Tempo Satellite and TCI (pursuant to Advanced's application to assign its construction permit) in arguing that it is still in due diligence, we point out that this contract underscores Advanced's lack of commitment to establish its direct broadcast satellite system. The assignment application indicates that Tempo Satellite has arranged financing, executed contracts for satellite launch and construction and for DBS receiving equipment, and has spent $246 million on satellite construction. Advanced's sole contribution to Tempo Satellite's system appears to be its construction permit. For these reasons and the reasons stated at paragraph 18, *infra*, we find that Advanced's latest contract does not demonstrate a capability and commitment on its part to operate a DBS system.

[25] Continental, 4 F.C.C. Rcd at 6296-7 (1989).

[26] *Id.* at 6301.

[27] Advanced, 6 F.C.C. Rcd at 2274.

the efforts of those who have worked to create the DBS industry. To do otherwise, Advanced argues, would discourage innovators in all new technological industries.

19. A further extension would not serve the public interest. Advanced has made little progress in construction, launch, and initiation of a DBS system in the past decade. During the same period, two DBS satellites have been launched and construction of others is underway.[28] There is no benefit to the public in allowing Advanced to continue to waste orbital locations and channels while two permittees have already initiated DBS service.

20. Advanced's current authorization required it to begin operation of a satellite by December 7, 1994.[29] It failed to do so. The "totality of the circumstances" presented by Advanced in its extension request does not justify granting additional time in which to begin operation. Accordingly, we deny Advanced's request for an extension of time to construct, launch, and operate a direct broadcast satellite system. Because Advanced has failed to satisfy this express condition of its construction permit, the permit is null and void by its own terms.

B. *Other Applications*

21. Inasmuch as we have concluded that Advanced's permit is null and void, its pending applications for assignment of that permit to Tempo DBS and related modification application are moot and are accordingly dismissed.[30] To the extent Advanced suggests that construction progress on Tempo Satellite's DBS satellites should be considered favorably in evaluating Advanced's extension request,

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[28] *See* note 21, *supra*.

[29] Advanced, 6 F.C.C. Rcd at 2274.

[30] To the extent the pleadings address Advanced's applications for assignment and for modification of its construction permit, such pleadings are likewise moot and will not be considered.

we disagree.[31] The Commission has based previous extensions of time on a finding that the efforts made by the permittee "reveal[] no lack of capability or commitment" to establish its DBS system.[32] Tempo Satellite's construction progress is irrelevant in determining whether Advanced should be granted an extension of time in which to construct and operate Advanced's satellites.[33] Moreover, we believe it would contravene the public interest to consider Tempo Satellite's construction progress in assessing Advanced's extension request. To do so would reward permittees' inaction or failure to comply with implementation milestones. Such warehousing precludes the use of channel and orbital assignments by other service providers, and will ultimately result in delays in service to the public.

22. In its opposition to Advanced's petition for extension of time, DBSC requests that some of Advanced's cancelled channels be assigned to DBSC. DBSC's request was not made within any designated filing period for modification applications, and is hereby rejected. We will soon

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[31] Under Advanced's proposal to assign its construction permit to Tempo DBS, the satellites deployed under Advanced's permit would be those now under construction for Tempo Satellite, Inc., a DBS permittee. Application for Modification of Construction Permit, DBS-94-16MP (October 14, 1994).

[32] USSB II at 7250.

[33] Advanced refers to the Commission's recent decision in Directsat Corp., 10 F.C.C. Rcd 88 (1995), as support for approval of the assignment of its construction permit to Tempo DBS. In that case, the Commission approved the transfer of control of DBS permittee Directsat Corporation from SSE Telecom. Inc. to Echo/Comms. Unlike the circumstances here, Directsat's "investment in the development of its DBS system has been substantial and the progress set forth in its semi-annual reports has been steady and consistent with the schedule established in its construction contract." *Id.* at para. 4. Consequently, the Commission concluded that the public interest in the expeditious provision of DBS service to the public would be advanced by this sale.

issue a notice regarding the reallocation of cancelled channels and available orbital positions.

V. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED, pursuant to Section 0.261 of the Communications Act of 1934, as amended, 47 U.S.C. § 0.261, that the Application File No. DBS-94-11-EXT IS DENIED and the construction permit issued to Advanced Communications Corporation in *Satellite Syndicated Systems*, 99 F.C.C. 2d 1369 (1984) IS DECLARED NULL AND VOID.

24. IT IS FURTHER ORDERED, that Application File Nos. DBS-94-15ACP and DBS-94-16MP are DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Scott Harris
SCOTT BLAKE HARRIS
Chief, International Bureau

APPENDIX E

47 U.S.C. § 309(j) Use of Competitive Bidding

* * * *

(7) Consideration of revenues in public interest determinations

(A) Consideration prohibited

In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(B) Consideration limited

In prescribing regulations pursuant to paragraph (4)(A) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

(C) Consideration of demand for spectrum not affected

Nothing in this paragraph shall be construed to prevent the Commission from continuing to consider consumer demand for spectrum-based services.

* * * *

47 C.F.R. § 100.19 (1995) License conditions

(a) All authorizations for interim direct broadcast satellite systems shall be subject to the policies set forth

in the *Report and Order* in General Docket 80-603 and with any policies and rules the Commission may adopt at a later date. It is the intention of the Commission, however, that in most circumstances the regulatory policies in force at the time of authorization to construct a satellite shall remain in force for that satellite throughout its operating lifetime.

(b) Parties granted authorizations shall proceed with diligence in constructing interim direct broadcast satellite systems. Permittees of interim direct broadcast satellite systems shall be required to begin construction or complete contracting for construction of the satellite station within one year of the grant of the construction permit. The satellite station shall also be required to be in operation within six years of the construction permit grant, unless otherwise determined by the Commission upon proper showing in any particular case. Transfer of control of the construction permit shall not be considered to justify extension of these deadlines.

Supreme Court, U.S.
FILED
NOV 26 1996
CLERK

(2)

No. 96-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ADVANCED COMMUNICATIONS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

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RULE 29.6 STATEMENT

MCI Telecommunications Corporation is a wholly owned subsidiary of MCI Communications Corporation.

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---

BRIEF OF RESPONDENT IN OPPOSITION

Respondent MCI Telecommunications Corporation ("MCI") submits this brief in opposition to the petition for certiorari filed by Advanced Communications Corporation ("Advanced"). Advanced seeks review of a judgment of the United States Court of Appeals for the District of Columbia Circuit upholding the Federal Communications Commission's ruling that Advanced had forfeited its Direct Broadcast Satellite (DBS) spectrum because it had failed to satisfy its "due diligence" obligations under the Commission's rules for the DBS service. The petition should be denied.

STATEMENT

The Commission awarded a conditional DBS construction permit to Advanced in 1984. The Commission's DBS regulations required Advanced, among other things,

to begin operating its system "within six years of the construction permit grant." 47 C.F.R. § 100.19(b) (1995). Advanced was unable to meet this requirement and requested an extension, which the Commission granted in 1991. *Advanced Communications Corp.*, 6 FCC Rcd 2269, 2274 (1991). By the time this first extension was due to expire, Advanced still had made no progress toward constructing, much less operating, a DBS system. Advanced thus sought a second four-year extension of its DBS construction permit or, alternatively, authority to assign its permit to a separate entity, Tempo DBS.

To obtain either form of relief, Advanced first had to show that it had complied with its obligation under FCC regulations to "proceed with diligence in constructing" its DBS system. 47 C.F.R. § 100.19(b). Despite clear regulatory language requiring it to "construct[]" a satellite system and to have that system "in operation" before its first permit extension expired, *id.*, and despite having been directly admonished of the need to comply with these requirements when it had received its first extension four years before, *see Advanced Communications Corp.*, 6 FCC Rcd 2269, 2272 (1991), *recon. denied*, 6 FCC Rcd 6977 (1991), Advanced's effort to show diligence was remarkably insubstantial. Advanced cited promotional, marketing, and legal activities, and unsuccessful negotiations with another DBS permittee that had attemped to acquire Advanced's permit, but was unable, fully ten years after receiving its construction permit, to point to "*any* concrete progress toward the actual construction and operation of its DBS system," Pet. App. 33a (emphasis added). Having failed to construct and operate a DBS system through its own efforts, Advanced also asked the Commission to violate its rules by crediting the activities of Tempo, the would-be transferee of Advanced's permit, toward Advanced's own performance requirements. *See* Pet. App. 34a. Not surprisingly, the Commission found that Advanced had *not* satisfied its diligence

obligation and, upon review, the D.C. Circuit upheld the Commission's application of its rules.[1]

Advanced's alternate line of attack below was that *other* permittees had been equally lax, yet had been allowed to transfer or extend their permits. The Commission and the Court of Appeals, however, carefully explained why these other permittees had been more diligent than Advanced. Pet. App. 38a-46a; 6a-7a.

Advanced's petition impugns the *motives* behind the Commission's due diligence ruling, but conspicuously does not attack the *merits* of the Commission's judicially affirmed finding of non-diligence. *See* Pet. 22. In this Court, as before in the International Bureau, the full Commission, and the Court of Appeals, Advanced identifies no basis for a finding of "diligence" in "constructing" its DBS system, regardless of what "standard of review" is applied.

ARGUMENT

This case is an exceptionally poor candidate for Supreme Court review. The decision below was unpublished; it was unanimous; not a single member of the D.C. Circuit called for rehearing *en banc*; and no conflict among the lower courts is even alleged. The "heightened scrutiny" standard petitioner urges for agency decisions that "reclaim" public spectrum that could subsequently be auctioned for the benefit of the U.S. Treasury has never been accepted by any court, and is plainly untenable.

The Court of Appeals applied the correct legal standard to petitioner's claim that the Commission tacitly relied upon an improper factor in reaching its decision. It simply found that the settled presumption of administrative regularity had not been overcome *on the facts of this case*. That determination was correct and presents no reason at all for Supreme Court review.

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[1] Respondent MCI was an intervenor in the Court of Appeals in support of Commission.

The court below expressly declined to pass upon petitioner's proposed construction of 47 U.S.C. § 309(j)(7)(A), properly concluding that this provision had no bearing in the circumstances presented. Petitioner's constitutional arguments in favor of a "heightened" review standard (Pet. 15-21) were not raised before the Commission or the Court of Appeals, and are meritless.

I. THE COURT OF APPEALS CORRECTLY APPLIED SETTLED LAW.

A. The Court of Appeals' Decision That Petitioner Failed to Overcome the Strong Presumption of Administrative Regularity Is Correct and Presents No Issue Calling for Supreme Court Review.

Attempting to conjure a legal controversy from what is merely the application of settled law to particular facts, petitioner mischaracterizes the decision below and asserts that the Court of Appeals believed that agency action may be set aside only when the agency "boldly admits" or "expressly announces" that an improper factor has motivated its decision. *See* Pet. 2, 22-23. The court below held no such thing.

Instead, after citing the familiar and *correct* principle that administrative orders " 'speak for themselves,' " Pet. App. 9a (citation omitted), the Court of Appeals explained that petitioner "ha[d] pointed to nothing in the record that is sufficient to overcome the strong presumption of agency regularity." Pet. App. 9a. The court plainly recognized that the presumption of regularity may be overcome upon the requisite "strong showing of bad faith or improper behavior." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).[2] It simply

[2] Petitioner argues for a different standard by selectively quoting decisions involving substantive constitutional rights not even arguably at issue here. For example, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (discussed in Pet. at 24-26), addressed a claim of intentional racial discrimina-

found that petitioner had not made the necessary showing here. That factbound judgment was correct, and is entirely unworthy of Supreme Court review.

The Court of Appeals had ample reason to reject petitioner's arguments regarding the Commission's motives. The most devastating refutation of petitioner's arguments is Advanced's own dismal performance as a DBS permittee. *See* Pet. App. 29a-46a. Because Advanced had done nothing to satisfy its obligation to *construct* and *launch* DBS satellites, *see* Pet. App. 33a, it would have been surprising, if not capricious, for the Commission to do anything *but* revoke Advanced's permit.

Petitioner repeatedly notes that this was the first and only case in which the Commission stripped a DBS permittee of its permit for failure to satisfy the second part of the due diligence standard. Pet. 25 (inaccurately calling the *Advanced Order* a "policy reversal" for this reason). But as the Commission explained, "[c]onsistency with prior precedent is not determined by whether the same *outcome* had been reached." Pet. App. 28a-29a. Prior permittees had proceeded with diligence; Advanced had not. *See* Pet. App. 5a-8a, 28a-29a, 38a-46a. No policy reversal was involved. The Court of Appeals,

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tion in violation of the Equal Protection Clause; the Court nowhere purported to alter the presumption of regularity attending agency decisions under the Administrative Procedure Act. *See Arlington Heights*, 429 U.S. at 265-66 ("When there is proof that a discriminatory purpose has been a motivating factor in [a governmental] decision, . . . judicial deference is no longer justified."). Except where substantive constitutional rights are at stake, it is simply not the law that this Court has " 'routinely inquired' " into the " 'motivation underlying executive or administrative decisions.' " Pet. 23 (quoting Tribe, American Constitutional Law § 12-5 at 814-15 (2d ed. 1988) (discussing First Amendment and Equal Protection cases)). In administrative law, the presumption has been exactly the reverse. *E.g., Citizens to Preserve Overton Park*, 401 U.S. at 420; *United States v. Morgan*, 313 U.S. 409, 422 (1941). *See also San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44-45 (D.C. Cir. 1986) (*en banc*).

which petitioner does not assert had improper motives, had no trouble upholding the Commission's application of its earlier decisions.

Additional considerations further belie Advanced's claim that the Commission's decision was attributable to an unspoken desire for federal revenue: (i) the Commission's International Bureau found that Advanced had not been diligent months before there was any suggestion that the spectrum in question might be auctioned (*see* Pet. App. 79a-91a), and (ii) both before and after the *Advanced Order*, the Commission *granted* permit extensions or transfer applications in numerous other cases involving valuable spectrum,[8] including cases petitioner claims were "virtually identical" to Advanced's own request (Pet. 25 and n.16). That is hardly the conduct of an agency in the thrall of auction revenues.

B. Petitioner Disregards the Commission's Actual Decision-Making Process.

Petitioner's primary submission is that the court below should have subjected the Commission's decision to "heightened scrutiny" because of "the agency's interest in reclaiming Advanced's spectrum *so that* it would be available for auction." Pet. 14 (emphasis added). But petitioner's premise is false: As the court below recognized, Pet. 9a, the Commission did not rely upon potential auction revenues as a reason for denying Advanced's application to extend or transfer its permit. Even the dissenting commissioners did not argue that the Commission's order was motivated by the prospect of a spectrum auction.

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[8] *See United States Satellite Broadcasting Co.*, 7 FCC Rcd 7247 (Vid. Svc. Div. 1992); *Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680 (1993), *recon. denied*, FCC 95-421 (1995); *Directsat Corp*, 10 FCC Rcd 88 (1993); *Continental Satellite Corp.*, 11 FCC Rcd 1157 (Int. Bur. 1995); *Direct Broadcast Satellite Corp.*, DA 95-2439 (Int. Bur. 1995); *EchoStar Satellite Corp.*, 11 FCC Rcd 3017 (Int. Bur. 1996); *Directsat Corp.*, 11 FCC Rcd 1775 (Int. Bur. 1996), *app. for review pending*, File No. 131-SAT-EXT-95.

Petitioner attempts to support its false premise by confusing the instant permit adjudication with the subsequent notice-and-comment rulemaking proceeding on how to reallocate the spectrum reclaimed from Advanced in the adjudication.[4] In fact, however, these two agency actions were procedurally, substantively, and temporally distinct. The only question before the International Bureau and the full Commission in the *Advanced* permit adjudication was whether to grant Advanced's applications for a permit extension or authority to transfer its permit, a question that turned on whether Advanced had been a "diligent" constructor of a DBS system. *See* Pet. App. 14a-15a; 80a-81a. To rule on those applications, the Commission did not need to, and did not, decide how it would reassign spectrum reclaimed from Advanced. *That* issue was not resolved until the conclusion of the subsequent rulemaking proceeding, in which the Commission exhaustively considered both auction *and* non-auction methods of redistributing the reclaimed spectrum. *See Auction Order*, 11 FCC Rcd at 9763-9773. The proper forum for any claims that the Commission's decision to hold an auction violated its auction authority was the rulemaking proceeding in which the Commission actually proposed, considered, and ultimately adopted an auction—*not* the prior adjudication over Advanced's entitlement to a second permit extension.

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[4] *See Notice of Proposed Rulemaking, Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 1297 (rel. Oct. 30, 1995); *Revision of Rules and Policies for the Direct Broadcasting Satellite Service*, 11 FCC Rcd 9712 (rel. Dec. 15, 1995) ("*Auction Order*"). The validity of the Commission's *Auction Order*, including the Commission's decision to rely on competitve bidding as the means for reallocating the spectrum formerly held by Advanced, is presently before the Court of Appeals. *See DIRECTV v. FCC*, No. 96-1001 (D.C. Cir. argued Oct. 1, 1996). Advanced did not file a petition for review or otherwise participate in that proceeding.

II. PETITIONER'S ARGUMENT FOR "HEIGHTENED SCRUTINY" FINDS NO SUPPORT IN FEDERAL STATUTES OR THE CONSTITUTION.

A. Petitioner's Proposed "Heightened" Standard of Review Has No Basis in the Administrative Procedure Act.

As the Court of Appeals noted, its review of the Commission's order was subject to the familiar "arbitrary [or] capricious" standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). Pet App. 5a. APA review is deferential, both as to factual judgments, *e.g., Consolo v. FMC*, 383 U.S. 607, 620 (1966), and legal judgments, *e.g., Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Petitioner's proposed "heightened review standard" has no place in this scheme.

Petitioner's argument depends entirely on the assumption that the Commission accorded dispositive weight to potential auction revenues, even though the Commission's order on its face was predicated entirely upon Advanced's failure to comply with the Commission's DBS regulations, It is settled law that, absent "a *strong showing* of bad faith or improper behavior," *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. at 420 (emphasis added), agency decisions stand or fall based upon the reasoning given by the agency. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). As the court below put it, " '[a]gency opinions, like judicial opinions, speak for themselves.' " Pet. App. 9a (quoting *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994)). "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co.*, 470 U.S. at 743-44 (citation omitted). Agency adjudicators are " 'assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of

its own circumstances.' " *Withrow v. Larkin*, 421 U.S. 35, 55 (1975) (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)). Courts are not authorized to " 'probe the[ir] mental processes.' " *Morgan*, 313 U.S. at 422 (citation omitted). "Just as a judge cannot be subjected to such a scrutiny[,] so the integrity of the administrative process must be equally respected." *Id.*

Petitioner's apparent position, however, is that the Commission's decision should have been subject to "heightened scrutiny" even *without* a "strong" threshold showing of "bad faith or improper behavior." But there is no basis in the APA or cases under it for a special departure from the "arbitrary or capricious" standard and the attendant presumption of regularity. Petitioner does not cite a single case under the APA in which a court was willing to jettison the presumption of agency good faith. As shown below, petitioner's efforts to ground their proposed presumption of *irregularity* in the auction statute itself or in the Due Process Clause are equally unavailing.

B. Section 309(j)(7)(A) Is Irrelevant to This Case, and Does Not Support Any "Heightened Review Standard."

Petitioner's argument for a "heightened review" standard is predicated in large part upon 47 U.S.C. § 309(j)(7)(A). Petitioner contends that § 309(j)(7)(A) categorically prevents the Commission from considering potential auction revenues. *See* Pet. 13, 15-17, 23. The Court of Appeals, however, recognized that petitioner's reliance upon § 309(j)(7)(A) was misplaced, because the Commission had *not* in fact relied upon auction revenues when it declined to extend ACC's permit. Pet. App 9a.[6] But even if petitioner were correct that § 309(j)(7)(A) comprehensively bans the Commission from considering auc-

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[6] The court was careful, however, to "express no opinion as to whether the Commission was in fact barred by law from taking into account the expected impact on federal revenues." Pet. App. 9a.

tion revenues, that provision would not create an extraordinary review standard requiring judges to second-guess the Commission's motives even when the Commission does not purport to have relied on auction revenues. Petitioner's argument depends upon a patent misreading of § 309(j)(7)(A), which does not even apply to FCC adjudications concerning performance requirements and license conditions. The proposition that § 309(j)(7)(A) somehow limits the Commission's power to reclaim Advanced's spectrum is also inconsistent with 47 U.S.C. § 309(j)(6)(C), which provides that "[n]othing in [§ 309(j)], or in the use of competitive bidding, shall . . . diminish the authority of the Commission, under the other provisions of this chapter to regulate or reclaim spectrum licenses."

Petitioner fails to show why § 309(j)(7)(A) should be construed to overrule, *sub silentio*, the ordinary and longstanding presumption that agencies in good faith report the reasons underlying their decisions. *See supra*, pp. 8-9. Advanced asks this Court to create an unorthodox new review standard based upon a construction of § 309(j)(7)(A) that no court has ever accepted, that the court below explicitly refused to pass upon, and that is contrary to the text of the auction statute itself.

C. Petitioner's Constitutional Arguments Were Not Raised Before the Commission or the Court of Appeals and Are Meritless.

Petitioner also argues that the Due Process Clause mandates its special "heightened review standard." Pet. 15-21. But in its briefs and oral argument in the Court of Appeals, petitioner did not rely upon the Due Process Clause or any other constitutional provision, and did not cite the cases on which it now relies. *See* Pet. 15-17 (citing *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust of So. Cal.*, 508 U.S. 602 (1993); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980); *Withrow v. Larkin*, 421 U.S. 35 (1975); *Ward v. Village of Mon-*

roeville, 409 U.S. 57 (1972), and *Tumey v. Ohio*, 273 U.S. 510 (1927)). Accordingly, the Court of Appeals did not address any constitutional claims. Petitioner's constitutional contentions are not properly before the Court. *See, e.g., United States v. Williams*, 504 U.S. 36 41 (1992).

Even if petitioner's new argument were properly before the Court, it is meritless. The possibility that the Commission, by ruling adversely on an application to extend a permit or approve a transfer, could make spectrum available for competitive bidding, does not even remotely present the risks of a personal or institutional bias sufficient to implicate the Due Process Clause.

First of all, petitioner does not and could not assert that any FCC Commissioner or employee had a *personal* financial stake in the outcome of this proceeding. *Cf. Tumey v. Ohio*, 273 U.S. 510 (1927) (striking down scheme under which an Ohio mayor received a portion of any fines he assessed as part of his compensation); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (optometrists on licensing board could not neutrally adjudicate complaint against their economic competitor); *Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust of So. Cal.*, 508 U.S. 602, 617 (1993) (noting danger of bias stemming from ERISA trustees' fiduciary duties to plan beneficiaries and personal liability for underfunding).

Nor is there reason to fear that the Commission would set aside its neutrality in hopes of "profiting," Pet. 6, 17, by subsequently holding an auction. The auction statute provides that "all proceeds from the use of a competitive bidding system . . . shall be deposited in the [United States] Treasury in accordance with chapter 33 of Title 31." 47 U.S.C. § 309(j)(8)(A). The only exception is that "the salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from [auction] proceeds for the cost of de-

veloping and implementing the program required by this subsection." § 309(j)(8)(B).

Because auction revenues go to the United States Treasury rather than the Commission, and because the FCC is in no way dependent upon auction revenue for its existence, petitioner's reliance on *Ward v. Monroeville*, 409 U.S. 57 (1972), is misplaced. In *Ward*, the town mayor was responsible both for managing town finances and for adjudicating ordinance violations and traffic offenses; the record showed that the fines the mayor assessed constituted between one-third and one-half of the town's annual revenues. *Ward*, 409 U.S. at 58-59. The *Ward* Court, citing *Tumey*, held this combination of functions unconstitutional because "the mayor's executive responsibilities for the village finances may make him partisan to maintain the high level of contribution from the mayor's court." 409 U.S. at 60.

In contrast to the situation in *Ward*, all net revenues from FCC auctions go to the Treasury, over which FCC Commissioners have no special administrative or political responsibility. And whereas the fines assessed in *Ward* constituted a substantial portion of total town revenues, the sums obtained from FCC auctions—particularly the small sub-set of auctions in which the spectrum at issue was *reclaimed* from a permittee—constitute a minuscule portion of total federal revenues. *Cf. Marshall v. Jerrico, Inc.*, 446 U.S. at 250-51 (observing that civil penalty assessments channeled to agency's enforcement division accounted for less than one percent of division's budget and that enforcement agents were "in no sense financially dependent on the maintenance of a high level of penalties").

Petitioner suggests, however, that the Commission's right to retain a portion of auction revenues to cover auction-related administrative costs, 47 U.S.C. § 309 (j)(8)(B), is sufficient to trigger "heightened scrutiny" under the Due Process Clause. Petitioner reasons that

"were [the Commission] to allocate the spectrum by other means, the cost would come out of its budget." Pet. 16. Under petitioner's "administrative costs" rationale, however, the Commission could just as likely have been "biased" in favor of *granting* Advanced's extension application, since it could thereby have avoided any need for reallocation and associated expenses.

If the Commission's ability to avoid the costs of an alternative spectrum reallocation procedure was enough to trigger "heightened scrutiny," then *any* agency decision that saves administrative resources (*e.g.*, decisions to forgo enforcement actions, to close a regional office, to rely on private market forces rather than regulation, or to assess fees from regulated parties) would be subject to such scrutiny. No court has held that the Constitution requires exceptionally probing review of an agency's decision whenever the decision saves resources. To the contrary, conservation of administrative costs is ordinarily an entirely legitimate factor for an agency to consider. *Cf. Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

Even more implausible is petitioner's contention that the Commission's decision should be subject to strict scrutiny because of the Commission's "institutional interest in generating auction revenues" for the United States Treasury. Pet. 17. Petitioner speculates that, because Congress favors auctions and controls the Commission's funding, the Commission can be presumed to skew its normal decisional processes to maximize the opportunities for holding auctions. *See id.* Petitioner's "institutional interest" theory is truly boundless, since it would require "heightened" judicial review whenever the agency had done something apt to please Congress (and thereby, at least potentially, to increase the agency's future appropriations).

Federal courts have never taken such a cynical view of agency administrators or their legislative overseers.

Like courts, agencies commonly confront controversial issues about which Congress and the public have strong views. Yet it has never been held that an agency's generalized interest in maintaining funding or congressional approbation triggers "heightened scrutiny." Administrators are presumed to be capable of basing their decisions on the evidence and the law before them. *See Schweiker v. McClure*, 456 U.S. 188, 196 n.9 (1982). They are "not assumed to be flabby creatures any more than judges are." *Morgan*, 313 U.S. at 421. It remains open, of course, for a challenger to make a showing that Congress has exercised undue influence in a particular agency proceeding. *Cf. ATX, Inc. v. United States Dep't of Transp.*, 41 F.3d 1522, 1527-28 (D.C. Cir. 1994); *Pillsbury Co. v. FTC*, 354 F.2d 952, 963-65 (5th Cir. 1966).[6] But the *presumption* of regularity casts the burden on the challenger to make that showing.

Petitioner provides no reason in logic or law why the proposed "heightened review standard" should be limited to "FCC decisions to reclaim spectrum for auction." Pet. 18.[7] Under petitioner's rationale, *any* order or rule that could ultimately produce a benefit for the United States Treasury should be presumptively suspect, whether it be an Internal Revenue Service ruling denying a claim of tax exemption; a Veterans Administration determination that an individual or class does not qualify for benefits; or a Department of the Interior regulation raising the fees for use of federal lands.

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[6] Petitioner evidently does not now assert an independent claim of undue congressional interference with the adjudicative process before the FCC; nor does petitioner quarrel with the D.C. Circuit's standard for evaluating such claims. *See ATX, Inc.*, 41 F.3d at 1527-28 (cited in Pet. at 18).

[7] Petitioner's reasoning would require heightened scrutiny of any FCC decisions regulating the performance of licensees, because enactment of strict regulations or performance requirements would predictably increase the incidence of permittee forfeiture and hence the potential for redistribution of reclaimed spectrum by auction.

Nor does petitioner provide any reason why its proposed standard should be confined to agency decisions. If the potential for gain to the United States Treasury were enough to create a cognizable risk of "bias," every judicial ruling (and every statute) that benefits the Treasury would be subject to heightened scrutiny. *Cf.* 2 Davis & Pierce, Administrative Law Treatise § 9.8 at 71 (1995). In short, petitioner's "heightened review standard" is as unworkable as it is unsupported by precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1996

ADVANCED COMMUNICATIONS CORPORATION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission correctly determined that petitioner had failed to act with due diligence in constructing a direct broadcast satellite system.

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is unpublished, but the judgment is noted at 84 F.3d 1452 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on May 6, 1996. A petition for rehearing was denied on June 27, 1996. Pet. App. 10a-11a. The petition for a writ of certiorari was filed on September 24, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Communications Commission (FCC) first authorized the development of direct broadcast satellite (DBS) systems—satellite systems that deliver video programming directly to viewers' homes by means of backyard receiving dishes—in 1982. Since then, the FCC has required any DBS permittee to "proceed with diligence" in completing construction of DBS systems and implementing DBS service. 47 C.F.R. 100.19. Specifically, each DBS permittee must meet two separate due diligence deadlines: first, it must complete contracting for the construction of DBS satellites within one year of the permit grant; and, second, it must complete construction of, and begin operating, its DBS system within six years of the permit grant, "unless otherwise determined by the Commission upon proper showing in any particular case." *Ibid.* A "[t]ransfer of control of the construction permit [to another entity] shall not be considered to justify extension of these deadlines." *Ibid.*; see *In re Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference*, 90 F.C.C.2d 676 (1982) (implementing "due diligence" requirement).

In the 14 years since the Commission adopted the DBS rules, several DBS permittees have violated one or the other of these due diligence requirements. Whether by cancelling construction permits or by rescinding satellite orbital assignments, the Commission has taken action eight times against permittees that have failed to comply with the first

requirement.[1] With respect to the second due diligence requirement—actual operation of the DBS system within six years of a permit grant—the Commission was initially more flexible. As the first group of permittees approached the end of the initial six-year construction period in the late 1980s, the Commission granted extensions to permittees that had proceeded diligently toward construction and operation of their DBS systems but had fallen short of the construction deadline because of factors beyond their control. See, *e.g.*, *In re United States Satellite Broadcasting Co.*, 3 FCC Rcd 6858 (1988) (*USSB I*).

At the same time, however, the Commission recognized that the number of new DBS applicants would soon exceed the scarce supply of available channels and orbital locations needed for DBS service. Accordingly, the Commission warned DBS permittees of the "need for stricter enforcement of the construction progress requirements of the DBS rules." *USSB I*, 3 FCC Rcd at 6861 (¶ 19). The Commission further cautioned permittees that uncertainties in the business market could no longer excuse failure to comply with the due diligence requirements. *Id.* at 6859 (¶ 11).

2. On December 6, 1984, the Commission granted a six-year DBS construction permit to petitioner Advanced Communications Corporation, which, like other such permits, was subject to the due diligence requirements. *In re Satellite Syndicated Systems*,

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[1] See *In re CBS, Inc.*, 99 F.C.C.2d 565, 571-573 (1984); *In re Tempo Enterprises, Inc.*, 1 FCC Rcd 20, 21 (1986); *In re RCA American Communications, Inc.*, 2 FCC Rcd 1204, 1205 (1987); *In re Continental Satellite Corp.*, 4 FCC Rcd 6292, 6296 (1989); *In re Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680, 6687 (1993), recon. denied, 10 FCC Rcd 12,743 (1995).

Inc., 99 F.C.C.2d 1369, 1387 (¶ 55) (1984). In 1986, the Commission determined that petitioner had satisfied the first such requirement by contracting for the construction of two satellites. *In re Tempo Enterprises, Inc.*, 1 FCC Rcd 20, 20-21 (¶¶ 5-7) (1986).

In early 1990, however, anticipating the expiration of its initial six-year construction permit, petitioner requested a four-year extension—to December 7, 1994—of its deadline to complete construction of its DBS system. C.A. App. 296. In requesting that extension, petitioner admitted that it had not begun construction of any of the satellites specified in its 1986 contract. Nonetheless, it cited several "factors outside its control" to support its extension request, and asserted that it had spent "considerable" energy and funds in advancing satellite technology, including DBS digital technology. *Id.* at 308-315.

The Commission granted petitioner's extension request. *In re Advanced Communications Corp.*, 6 FCC Rcd 2269 (1991). It found that "[a]t this stage of the development of the DBS industry we believe that the efforts expended by [petitioner] and the impediments and delays it has experienced are sufficient to demonstrate" that petitioner had pursued its DBS system with due diligence. *Id.* at 2274 (¶ 30). Yet the Commission specifically warned petitioner that, "[i]n the future, continued reliance on experimentation, technological developments and changed plans will not necessarily justify an extension of a DBS authorization." *Ibid.* (¶ 31).

During the entire four-year extension period granted by the Commission, petitioner took no concrete measures to construct its own DBS system. Indeed, petitioner made no payments at all for the construction of DBS satellites, even though, in its

extension request, it had set forth a detailed payment schedule and a series of construction milestones. See 6 FCC Rcd at 2272 (¶ 17). In April 1994, three months after the date by which petitioner originally promised to have completed construction of its first satellite, petitioner submitted a revised schedule under which satellite construction would not even *start* until April 1995, *after* the December 1994 expiration of petitioner's extended construction permit. C.A. App. 344-349.

Thus, shortly before that expiration date, petitioner requested a second four-year extension of time. C.A. App. 366. Petitioner conceded that it had not yet begun construction of satellites, a failure that it attributed to its unsuccessful attempt to negotiate a joint-venture agreement with another permittee, EchoStar Satellite Corp. *Id.* at 368-370. Petitioner based its extension request principally on its technological and lobbying efforts in support of DBS service. *Id.* at 370-375.

More than a month after filing its second extension request, and just a few weeks before the expiration of its construction permit, petitioner entered into an agreement with Tele-Communications, Inc. (TCI) under which, in effect, TCI would pay petitioner $45 million in stock for the use of petitioner's channel and orbital position assignments in providing TCI's own broadcast service. See Pet. App. 34a-36a (¶¶ 38-42) (describing the various proposed alternative transactions). Petitioner claimed that this agreement satisfied the due diligence requirement. Specifically, it claimed due diligence credit for the two nearly completed satellites that TCI had procured for its own use at its own orbital location but had agreed to divert to petitioner's different orbital location upon fulfillment of the agreement. C.A. App. 417.

3. a. The FCC's International Bureau denied petitioner's request for a second extension on the ground that petitioner had failed to meet its due diligence obligations. Pet. App. 79a-91a. The Bureau found that petitioner's own business decisions had foreclosed petitioner's progress toward the launch and operation of its DBS system. *Id.* at 85a-89a (¶¶ 13-19). The Bureau also determined that petitioner could not rely upon the proposed TCI transaction to satisfy its due diligence obligations. *Id.* at 89a-90a (¶ 21). Accordingly, the Bureau cancelled petitioner's construction permit and determined that petitioner's requests to assign and modify its permit were moot. *Id.* at 91a (¶¶ 23-24).

b. Petitioner appealed to the full Commission, which, in a 3-2 vote, affirmed the Bureau's decision. Pet. App. 12a-78a. The Commission found that, despite the Commission's earlier warnings to begin construction immediately, "[petitioner] has not achieved any concrete progress toward the actual construction and operation of its DBS system." See *id.* at 32a-33a (¶¶ 35-37), 37a-38a (¶¶ 44-45). The Commission rejected petitioner's claim that its agreement with TCI sufficed to meet petitioner's own due diligence requirements. That agreement, the Commission found, constituted nothing more than TCI's attempt to use petitioner's channels and orbital location for its own DBS service. *Id.* at 34a (¶ 39). Because TCI would pay all costs for construction, launch and operation of the satellites, because TCI would have title to those satellites, and because petitioner would dissolve upon completion of the proposed transaction (see *id.* at 34a-35a (¶¶ 39-40)), the Commission concluded that "[petitioner's] sole contribution to this

DBS system appears to be its authorization to use public resources." *Id.* at 35a-36a (¶ 41).[2]

The Commission therefore determined that the public interest required cancellation and reassignment of petitioner's DBS channels and orbital location. The Commission concluded that "[t]he DBS due diligence rules were designed to ensure that permittees would go forward expeditiously with the development of their systems. In this case, [petitioner's] lack of due diligence has resulted in a warehousing of spectrum from which it now seeks to profit. Such a result would be contrary to the public interest in the prompt and efficient use of DBS spectrum to provide a competitive service to the public." Pet. App. 46a (¶ 64).

Having denied petitioner's permit extension request, the Commission briefly addressed a separate issue: the disposition of petitioner's forfeited orbital location and channel assignments. The Commission tentatively suggested that the Commission's auction authority under 47 U.S.C. 309(j) could be the most appropriate means of assigning reclaimed or unused DBS spectrum, but it deferred that issue to a separate notice-and-comment rulemaking proceeding. Pet. App. 51a-52a (¶¶ 72-74).

Commissioners Ness and Chong each filed separate statements joining in the Commission's decision. See Pet. App. 57a-59a, 60a-63a. Commissioners Barrett

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[2] The Commission added that the proposed transfer to TCI would be "futile" in any event under the existing FCC rule (47 C.F.R. 100.19) that any transferee must be held to the same due diligence deadlines as the transferor. Pet. App. 36a (¶ 42); see also *Jefferson Radio Co.* v. *FCC*, 340 F.2d 781 (D.C. Cir. 1964) (cited at Pet. App. 36a n.84).

and Quello filed separate dissents. See *id.* at 64a-70a, 71a-78a.

c. Two weeks after denying petitioner's extension application, the Commission initiated a rulemaking proceeding to determine the appropriate method for assigning reclaimed or unassigned DBS channels. See *In re Revision of Rules and Policies for the Direct Broadcast Satellite Service, Notice of Proposed Rulemaking*, 11 FCC Rcd 1297 (1995). After notice and comment, the Commission unanimously determined that, as a general matter, public auctions are the best means of achieving that objective. See *In re Revision of Rules and Policies for the Direct Broadcast Satellite Service, Report and Order*, FCC 95-507 (Dec. 15, 1995), petition for review pending, *DIRECTV, Inc.* v. *FCC*, Nos. 96-1001, et al. (D.C. Cir.).[3] On January 26, 1996, the Commission held an auction for reassignment of petitioner's former spectrum. MCI Communications Corp. (MCI) won assignment of some of the reclaimed spectrum with a bid of $682.5 million; EchoStar won assignment of the remaining spectrum with a bid of $52.3 million. C.A. App. 893-894.

4. In a brief, unpublished order, the court of appeals affirmed the Commission's order denying petitioner's request for a second extension and reclaiming petitioner's DBS channels and orbital location. Pet. App. 1a-9a. In rejecting petitioner's argument that the Commission had granted other extensions on

[3] In separate statements, Commissioners Quello and Barrett concurred in the decision to use auctions for assigning reclaimed or unused spectrum in the future, but objected to auctioning petitioner's former spectrum on the theory that the Commission had improperly denied petitioner's request for a second extension of its construction permit.

similar facts, the court closely examined the prior Commission decisions at issue and concluded that each was fully consistent with the decision under review. *Id.* at 6a-8a. The court also rejected petitioner's argument that the Commission had departed from its stated goal of ensuring the prompt initiation of DBS service; instead, the court observed that the Commission's decision reflected its interest in maintaining the credibility of its due diligence policy. *Id.* at 8a. "Although enforcement of the due diligence rules may cause delays in the provision of a particular DBS system, the Commission's anti-warehousing policy relies on the enforcement of its due diligence obligations; otherwise, it could not ensure the prompt delivery of DBS service as a general matter." *Ibid.*

Finally, the court rejected petitioner's claim that the Commission had violated 47 U.S.C. 309(j)(7)(A) by supposedly allowing the expectation of auction revenues to play a role in its decision that petitioner had violated the Commission's due diligence requirements. Pet. App. 9a. The court noted that

> the Order does not base its denial of [petitioner's] renewal application on the expectation of such revenues. Rather, the Commission's decision was predicated on [petitioner's] failure to achieve "any concrete progress toward the actual construction and operation of its DBS system" during its first extension period.

Ibid. With respect to petitioner's claim that the Commission had based its order on "some alleged illicit motivation" rather than on the reasons set forth in the order itself, the court found that petitioner had failed to make the requisite factual showing to overcome the "strong" presumption of regularity in

agency decisionmaking. *Ibid.* The court expressed no opinion on the correctness of petitioner's contested interpretation of Section 309(j)(7)(A). *Ibid.*

ARGUMENT

The petition presents two questions (see Pet. i): first, whether "heightened scrutiny" is applicable in judicial review of agency decisions that may have the ultimate effect of conferring a financial benefit on the government; and, second, whether the court of appeals erred, as a factual matter, in determining that the order under review here was based on the Commission's stated reasons rather than on unstated, impermissible reasons. Neither question warrants this Court's review.

1. a. A decision of an administrative agency is ordinarily deemed to rest on the grounds stated by the agency itself; "there must be a strong showing of bad faith or improper behavior" before a court will permit "inquiry into the mental processes of administrative decisionmakers." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971); see also *United States* v. *Morgan*, 313 U.S. 409, 421-422 (1941). "Without a showing to the contrary," administrative decisionmakers "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *Withrow* v. *Larkin*, 421 U.S. 35, 55 (1975) (quoting *Morgan*, 313 U.S. at 421); accord *FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965).

The court of appeals followed that presumption of administrative regularity here, and it found, as a factual matter, that petitioner "ha[d] pointed to nothing in the record that is sufficient to overcome the strong presumption of agency regularity." Pet. App. 9a

(internal quotation marks omitted). Apart from its factual challenge to that determination, which we address below (pp. 16-19), petitioner claims that, despite this Court's general prohibition on "inquir[ing] into the mental processes of administrative decision-makers," *Overton Park*, 401 U.S. at 420, the court of appeals should have subjected the Commission's decision to "heightened scrutiny, given the agency's interest in reclaiming [petitioner's] spectrum so that it would be available for auction." Pet. 14.[4]

Petitioner's argument for heightened scrutiny is without precedent and without merit. Petitioner cites no authority for its suggestion (see Pet. 15) that the general rule of judicial deference to administrative decisions, see, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is inapplicable where the administrative order under review could result in a pecuniary gain for the government. Because agency actions commonly implicate an agency's budgetary interests, any "exception" to settled principles of deference based on an agency's alleged pecuniary motives would be broad and exceptionally difficult to apply. That is perhaps one reason why this Court and other courts have not recognized (much less addressed) any such exception even in cases in which that exception would appear, under petitioner's theory, to be applicable. See, *e.g.*, *United States* v. *Boyle*, 469 U.S. 241, 246 n.4 (1985)

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[4] Petitioner contends that application of that "heightened" standard of review would "likely" have led to the invalidation of the Commission's order. Pet. 22. The petition does not set forth the argument on the merits that, according to petitioner, would "likely" prevail under heightened scrutiny; indeed, petitioner insists that, "[f]or present purposes, the fine points of [that] argument are not important." *Ibid.*

(applying *Chevron* deference to IRS interpretation of Internal Revenue Code); *American Medical Ass'n* v. *Reno*, 57 F.3d 1129, 1135 (D.C. Cir. 1995) (noting government's entitlement to "sound amount of deference" in determining scope of agency program that small segment of population must subsidize by means of user fees); *Florida Power & Light Co.* v. *United States*, 846 F.2d 765, 770 (D.C. Cir. 1988) (similar), cert. denied, 490 U.S. 1045 (1989); see also *Lincoln* v. *Vigil*, 508 U.S. 182 (1993) (denying judicial review altogether of agency decision to discontinue certain benefits); *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 222-223 (1989) (rejecting argument favoring "the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power").

b. Because there is no support for petitioner's position in cases interpreting the Administrative Procedure Act, petitioner invokes a number of cases (see Pet. 15-19) in which this Court has held that, in some circumstances, constitutional principles of due process bar interested individuals from adjudicating certain kinds of disputes. The Court's principal concern in those cases has been to assure the "neutrality" of adjudicators, *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980), in circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," *Withrow*, 421 U.S. at 47.

As an initial matter, petitioner did not present this due process claim to the court of appeals, and it is therefore not properly before this Court. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, the due process decisions upon

which petitioner relies are inapposite. In each case, the adjudicator faced direct, obvious, and enormous financial incentives to skew the outcome of adjudication. See, *e.g.*, *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (mayor received part of his compensation out of any fines he assessed); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972) (fines assessed by mayor went directly to the city's general revenue and constituted between one-third and one-half of the city's annual revenue); see also *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993) (potential personal liability of trustees created risk of bias).

That concern is absent here. First, the Commission may retain from auction revenues only the sums necessary to recover its "costs of developing and implementing" the auction program itself, subject to approval by the Office of Management and Budget (OMB). See 47 U.S.C. 309(j)(8)(A) and (B).[5] All other proceeds are deposited into general treasury funds, of which the auction proceeds at issue here constitute a minuscule fraction. Moreover, the due process decisions cited by petitioner generally addressed the potential bias of sole decisionmakers acting in an informal setting, often without meaningful review, and subject to potentially unchecked and undetectable

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[5] See 47 U.S.C. 309(j)(8)(B) (retained auction funds shall be "subject to the terms and conditions of the receiving appropriations account"). The FCC includes its "auction earned reimbursables" in its annual "Apportionment and Reapportionment Schedule" pursuant to OMB Circular No. A-34. See 31 U.S.C. 1513(b)(1) (apportionments for each federal executive agency shall be made in writing); Exec. Order No. 11,541, 35 Fed. Reg. 10,737 (1970) (delegating to Director of OMB responsibility for making apportionments).

financial pressures. Here, by contrast, the decision-maker at issue is a multi-member federal commission bound by the full panoply of administrative procedural requirements, including the requirement that it base its decisions on findings supported by substantial evidence and subject to judicial review. Under these circumstances, the due process concerns untimely invoked by petitioner are inapposite. See *Marshall*, 446 U.S. at 250-252 (rejecting due process claim on analogous facts).

c. Petitioner also appears to argue (see Pet. 13-14) that 47 U.S.C. 309(j)(7)(A)—which precludes the Commission from considering potential auction revenues in certain circumstances—requires heightened scrutiny of any Commission decision that might create such revenues. That argument is without merit. Even if Section 309(j)(7)(A) could be construed to affect the standard of judicial review in any context, which it cannot, it would be inapplicable here. Section 309(j)(7)(A) provides:

> In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

By its terms, this provision precludes the Commission from relying on expected auction revenues only in dividing the electromagnetic spectrum among various potential uses (pursuant to Section 303(c))

and in promulgating regulations governing that division of spectrum (pursuant to Section 309(j)(4)(C)). Thus, regardless of the effect of Section 309(j)(7)(A) on the Commission's decision to allocate unassigned DBS spectrum by means of an auction—an issue pending in the D.C. Circuit, see *DIRECTV, Inc.* v. *FCC*, Nos. 96-1001, et al., and not now before this Court—that provision has no bearing on the prior and distinct Commission determination under review here: the determination that petitioner had failed to proceed with diligence in constructing its DBS system and had therefore forfeited its channel and orbital position assignments. See 47 U.S.C. 309(j)(6)(C) (nothing in Section 309(j) shall be construed to "diminish the authority of the Commission under the other provisions of [the Communications Act of 1934] to regulate or reclaim spectrum licenses").[6] In any event, as the court of appeals found

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[6] Petitioner's contrary position would have serious consequences beyond this case. Many FCC licenses, including licenses assigned by auction, are issued subject to performance conditions similar to the due diligence requirement for DBS licenses. See, *e.g.*, 47 C.F.R. 24.203, 24.843. The Commission regularly enforces such conditions by license termination or refusals to extend construction permits, see, *e.g.*, *P & R Temmer* v. *FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984), and has already cancelled and re-auctioned several licenses for the provision of non-DBS services for failure to comply with those conditions, see, *e.g.*, *In re Reauction of Defaulted PCS C Block Licenses*, DA 96-1061 (June 28, 1996); *In re Emergency Petition for Waiver of Deadline for Submission of Down Payment for the Broadband PCS C Block Auction filed by BDPCS, Inc.*, DA 96-811 (May 20, 1996), recon. denied, DA 96-874 (May 30, 1996). Under petitioner's reading of Section 309(j)(7)(A), each of those enforcement decisions would be subject to extraordinary judicial scrutiny to ferret out any alleged financial

and as discussed below, petitioner has made no showing that the Commission based that determination on the prospect of auction revenues or any other consideration not set forth in the order under review.

2. Apart from its novel proposal for "heightened scrutiny" of administrative actions that could result in a pecuniary gain for the government, petitioner challenges the court of appeals' determination (see Pet. App. 9a) that the order under review did not, in fact, rest on unstated, improper considerations. That factbound challenge is without merit.

The court of appeals determined that the Commission had articulated persuasive reasons for distinguishing petitioner's case from several other cases in which the Commission had granted extensions of due diligence deadlines for other DBS permittees, each of which, the court agreed, had made significantly more progress than petitioner toward the construction of an operable DBS system. See Pet. App. 6a-9a. Petitioner does not squarely challenge that determination in this Court. See Pet. 22 ("For present purposes, the fine points of Advanced's argument are not important."). Instead, petitioner appears to argue that, even if the Commission did articulate a reasonable basis for distinguishing its decisions regarding other DBS permittees, its order cancelling petitioner's permit is nonetheless invalid because the "true" motivation for that order was an unarticulated and impermissible desire to increase auction revenues.

"motivation" behind the decision, regardless of the Commission's stated basis for its decision. In drafting the narrow provision of Section 309(j)(7)(A), Congress did not intend to create such an unworkable scheme.

The court of appeals based its refusal "to search beyond the text of the Order" on a factual determination that petitioner "ha[d] pointed to nothing in the record that is sufficient to overcome the strong presumption of agency regularity." Pet. App. 9a (internal quotation marks omitted).[7] Petitioner's attempt to relitigate that same factual issue in this Court is without merit. As the court of appeals recognized (*id.* at 8a-9a), the Commission's decision rested on the need to develop a credible enforcement policy "to pre-

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[7] Although the dissenting Commissioners disputed the Commission's conclusions on the merits, they did not claim that those conclusions rested on considerations not set forth in the Commission's written order. See Pet. App. 68a-74a. Moreover, Commissioner Barrett did not say that he was asked whether MCI's proposed bid changed his mind regarding the merits of petitioner's due diligence showing; rather, he was asked only whether that bid changed his mind on whether auctions were the most appropriate means of reassigning those channels once they were reclaimed. See C.A. App. 160 n.5. Similarly, it was in the context of noting its tentative support for auctions, before initiating the rulemaking proceeding that resolved the issue, that the Commission majority noted MCI's letter indicating an interest in bidding at such an auction. Pet. App. 48a n.127.

Also without substance are petitioner's references (Pet. 6-7, 12, 24-25) to Chairman Hundt's public statements regarding the FCC's fulfillment of Congress's mandate that the Commission seek "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use." 47 U.S.C. 309(j)(3)(C). With only one exception, petitioner cites statements referring to the Commission's overall auction performance, which covers several different communications services and spans a three-year period. The only specific reference to the January 1996 DBS auction (see Pet. 12) made no reference to the only determination at issue here: the Commission's finding that petitioner had not proceeded with due diligence in constructing its own DBS system.

vent the 'warehousing' of spectrum," not on a covert wish to increase auction revenues. Indeed, as noted above, the Commission cancelled petitioner's DBS permit for noncompliance with due diligence requirements before the Commission had even begun rulemaking proceedings—now the subject of separate litigation to which petitioner is not a party—on the appropriateness of using auctions to allocate unassigned DBS channels and orbital slots. See *DIRECTV, Inc.* v. *FCC*, *supra*; see also Pet. App. 47a-48a (¶¶ 65-66). Thus, even if the outcome of the auction rulemaking is ultimately vacated by the court of appeals, the separate decision revoking petitioner's DBS permit will stand, and the spectrum will be allocated by another method. See C.A. App. 238 (¶ 152).

Nor is there any basis for petitioner's claim that congressional pressure improperly influenced the FCC's due diligence decision.[8] As petitioner concedes (see Pet. 25 & n.16), just after the order denying petitioner's construction extension, and around the

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[8] In the court of appeals, petitioner based much of its argument concerning congressional pressure on *ATX, Inc.* v. *United States Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994). In that case, the D.C. Circuit noted that, where an agency "suddenly * * * reverse[s] course or reach[es] a weakly-supported determination" in the face of congressional pressure, "we might infer that pressure did influence the final decision." *Id.* at 1529. After the panel issued the decision below, petitioner (unsuccessfully) sought rehearing and rehearing en banc principally on the ground that the panel had impermissibly departed from *ATX*. Petitioner has no basis for asking this Court to address the same factbound allegations of congressional influence that the D.C. Circuit found inadequate under that court's own applicable precedent.

time of the subsequent auction rulemaking proceeding, the Commission *granted* four DBS construction permit extensions, finding due diligence in each case. If, as petitioner claims, the FCC had permitted Congress's desire for more auction revenues to taint its due diligence findings, it would have reclaimed the spectrum of those permittees—as petitioner in fact urged it to do, see *In re EchoStar Satellite Corp.*, 11 FCC Rcd 3017, 3018 (¶ 10) (1996)—to make additional spectrum available for reassignment at the January 1996 auction. Instead, however, the FCC granted extensions to the permittees, noting the differences between their comparatively diligent performance and petitioner's utter failure, notwithstanding its four-year extension period, to make any concrete progress toward the construction of its own DBS system. See *id.* at 3018-3019 (¶ 14).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ADVANCED COMMUNICATIONS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF WILLIAM PHILIP WELTY IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court, William Philip Welty hereby moves for leave to file the attached Amicus Curiae Brief in Support of Petitioner.

Petitioner, Respondent and the other parties, except for United States Satellite Broadcasting, Inc. ("USSB") have consented to the filing. USSB has refused to give its consent.

Me. Welty is able to assist the Court by offering relevant matter not otherwise likely to come to the Court's attention. S. Ct. Rule 37.1. Because of his unique knowledge of and long-term experience in the direct broadcast satellite ("DBS") field, Mr. Welty has a perspective shared by few others in this case.

Mr. Welty was the founder, President, Chief Executive Officer and a principal stockholder of DBS permittee Continental Satellite Corporation ("CSC"). CSC is mentioned prominently in this proceeding.

Mr. Welty's participation in CSC terminated in March 1996 following approval by the Federal Communications Commission of a transfer of control of the company. He offers his brief as an interested individual.

Although as CSC's chief officer Mr. Welty has been a vigorous competitor of Petitioner Advanced Communications Corporation ("ACC") for the allocation of scarce DBS facilities, he submits the attached brief because CSC —like ACC—suffered as a result of inconsistent and arbitrary decision making by Respondent FCC in its regulation of DBS. In CSC's case—unlike ACC's—the Commission concedes its lack of diligence and CSC has properly been allowed to continue onward as a permittee.

As detailed in the attached brief, by its own admission the FCC delayed action on CSC's orbital and channel assignment requests for *five years*, only approving them eight days before CSC's construction permit was to expire.* The brief further demonstrates that other DBS permittees were treated nearly as cavalierly by the Commission.

Ironically, the Commission has argued to the D.C. Circuit, and may well argue here, that its extension grants of CSC's and others' construction permits prove that its contemporaneous denial of an ACC extension and the cancellation of ACC's facilities were the product of reasoned decision making, rather than the result of excessive influence by Congress to auction the channels and enrich the Federal Treasury. The facts clearly refute this claim.

Mr. Welty believes that in reclaiming ACC's facilities and then auctioning them off to the highest bidder, the

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* *Continental Satellite Corp.*, 10 FCC Rcd 10473 (Int'l. Bur. 1995), 11 FCC Rcd 1157 (Int'l. Bur. 1995).

FCC has acted inappropriately and contrary to law. Its sanctions against ACC were arbitrary and capricious; the antithesis of reasoned decision making by an administrative agency. He offers his brief to assist the Court in resolving this important and extraordinary case.

Wherefore, William Philip Welty respectfully moves for leave to file his amicus curiae brief.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF WILLIAM PHILIP WELTY IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

William Philip Welty was the founder, President, Chief Executive Officer and a major shareholder of direct broadcast satellite ("DBS") permittee Continental Satellite Corporation ("CSC"). CSC, which is mentioned throughout this case, has since 1989 been a permittee and a competitor of Petitioner Advanced Communications Corporation ("ACC") for scarce DBS facilities.

Mr. Welty's interest in CSC terminated in March 1996 following Federal Communications Commission approval of a transfer of control of the company. He submits this

brief as an interested individual with firsthand knowledge of DBS and of the difficulties which visionaries like CSC and ACC labored under during the harder times before new digital communications technologies were perfected and entrepreneurs lined up to bid hundreds of millions for the opportunity to build and launch direct broadcast satellite systems.

Mr. Welty (whose Declaration under penalty of perjury is appended hereto) recalls that CSC, like ACC, suffered from the FCC's inattentive regulation of the fledgling DBS service. As is hereinafter shown, the Commission candidly admits that *it* was the principal cause of delays in CSC's—and other permittees'—initiation of their DBS service. The agency inexplicably delayed for years in processing permittees' requests for orbital and channel assignments and so retarded the inauguration of a competitive DBS service. It is ironic that the agency bases its retaking and subsequent auction of ACC's facilities on permittee inaction: for years the biggest roadblock to the startup of DBS was the FCC itself.

Because he competed with ACC for the allocation of DBS facilities, Mr. Welty understands the frustration which ACC, long a determined and innovative DBS pioneer, now experiences as the lone target of a sudden, unjustifiable government course correction. Since he firmly believes that all DBS permittees deserved equal treatment from the FCC, Mr. Welty supports the grant of ACC's Petition for Certiorari.

SUMMARY OF THE ARGUMENT

ACC's brief contains substantial evidence supporting a grant of its Petition. This brief offers additional proof that Respondent FCC's denial of ACC's request to extend its construction permit was not the epitome of reasoned decision making, but resulted instead from intensive pressures imposed on the FCC by Congress to sell off every

available *hertz* of electromagnetic spectrum, to enrich the Federal Treasury during a well-recalled recent period of fiscal turmoil.

There is strong reason to believe that the expectation of significant auction revenues, and the possibility that they might impact favorably on Congress's intensive deliberations over the FCC's budget, played a part in the Commission's unprecedented treatment of ACC. But while the auction of ACC's facilities was a boon to Congressional budgeteers, it was far from the FCC's finest hour.

As the Petition alludes, Respondent's retaking of ACC's DBS facilities, in *Advanced Communications Corp.*, 11 FCC Rcd 3399 (1995) (referred to hereinafter as the "*ACC Decision*"), is so inconsistent with every other DBS ruling, and its rationale so overstated,[1] that it is proper to conclude that the FCC succumbed to Congressional pressure to raise money in order to preserve the agency's regulatory mission.[2]

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[1] It is black letter law that "agency action cannot stand when it is 'so inconsistent with its precedents as to constitute arbitrary treatment amounting to an abuse of discretion.'" *Garrett Broadcasting Service v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975) (Citations omitted). The *ACC Decision* is invalid if the Court cannot perceive the relevance of enumerated factual differences in the treatment of similarly situated parties "to the purposes of the Communications Act." *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965). With due respect to the FCC and its late-1995 budgetary quagmire, the agency has not adequately justified the seizure of ACC's facilities.

[2] While this case was before the D.C. Circuit, the FCC sought to minimize the impact of Congress's purse powers on its decision making. The published record speaks for itself. See ACC Petition n.2, and its report of legislators' threats, while the *ACC Decision* was under review, to substantially cut the agency's budget. Chairman Hundt countered by repeatedly dangling before Congress the prospect of ever more billions yet to flow from spectrum auctions, in an effort to protect and defend "this cash cow": the FCC. Stern, *Hundt Calls Budget Slash "Mistake"*, *Broadcasting & Cable*, Sept. 11, 1995, at 18.

As a consequence of this fusillade, the FCC rendered a decision it would not otherwise have made (indeed, had never before made), in apparent contravention of 47 U.S.C. § 309(j), "pulling the plug" on ACC and allowing high bidders to snap up the channels for nearly three-quarters of a billion dollars.[3] Of course the FCC argues vigorously to the contrary: it denies that there is smoke and cannot see any fire.

This brief disproves Respondent's assertion that a series of post-*ACC Decision* DBS extension grants shows that ACC's case was untainted by excess influence. Those cases are not helpful to the FCC.

The Commission exacerbated delays in DBS startup by years of disinterested oversight of the new service. For years the agency was *the* major impediment to permittees desirous of building their systems. It declined—for a number of years in several instances—to make orbital and channel assignments until permits were on the verge of expiration. Absent such assignments the permittees could not proceed. In one of these cases (cited, ironically, by the FCC to demonstrate its good faith in rendering the *ACC Decision*), the Commission admits that for years, *it* lacked due diligence.[4] Yet it found no difficulty shortly afterwards in canceling ACC's permit for its purported delays, disregarding in the process a decade of effort and innovation.

This brief addresses Respondent's argument to the D.C. Circuit that, under established precedent, there is no evidence of undue influence. The FCC argues, based on the number of letters it received from legislators, that it was

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[3] Then the FCC Chairman gloated over the "colossal sum, 682 million [by one successful bidder] in an auction for the DBS satellite slot. The amount didn't matter at all. Who am I kidding?" Hundt Speech to the Artists Rights Foundation, Feb. 15, 1996 (as prepared for delivery). Petition at 12. The Chairman has neglected to mention, in that address or elsewhere, what the auction cost ACC.

[4] *Continental Satellite Corp.*, 10 FCC Rcd 10743 (Int'l. Bur. 1995).

not pressured. The true test, however, is whether all the "extraneous factors" it confronted "intruded into the calculus of consideration."[5] The Petition glaringly recalls many of these "extraneous factors"; letters to the agency represent only a small part of Congress's muscle-flexing.

Comparison of the *ACC Decision* with other notable contemporaneous DBS rulings helps verify that outside forces collectively impacted on the decision making process.[6] How else to explain the FCC's sudden and radical departure at just that moment from years of consistent, favorable rulings?

The FCC's attempt to distinguish ACC's diligence from that of other permittees who received permit extensions represents final confirmation that the *ACC Decision* is not a paradigm of reasoned decision making. Although ACC did not move hastiily to build its DBS system, neither did anyone else. Until very recently, DBS technology was not sufficiently advanced and investors were unwilling to commit the staggering sums needed to build and launch these unique satellites. A kinder, gentler FCC regularly granted extensions to permittees who proved by their deeds that they meant to keep their words.[7] ACC was surely one of

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[5] *ATX, Inc. v. United States Dept. of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994) (Citations omitted.)

[6] Some of these pressures are reflected in continuing Senatorial anger at the *ACC Decision* dissenters, long after the auction had ended. During a June 1996 Senate Commerce Committee oversight hearing, Senator John McCain "cross-examined FCC Commissioner James Quello about Quello's opposition to the FCC decision to reclaim and auction DBS channels once owned by Advanced Communications Corp. 'If you had your way, the taxpayers would have gotten nothing,' McCain said. When Commissioner Quello said that he had no strong opinion either way about the auction, Senator McCain replied: 'I think it's a pretty big deal. Perhaps you don't.'" Fleming, *Senator McCain moves up, Broadcasting & Cable*, Nov. 11, 1996, at 18-19.

[7] *See ACC Decision* (Dissenting Statement of Commissioner Andrew C. Barrett), at 11 FCC Rcd 3435-39.

these and deserves the same chance the others received to see its dreams realized.

As a dissenter sadly remarked, the Commission's justifications for tossing ACC off the DBS playing field are "distinctions without a difference." [8] For these reasons, ACC's Petition should be granted.

ARGUMENT

I. THE FCC'S HAPHAZARD ADMINISTRATION OF THE DBS SERVICE CONTRIBUTED SIGNIFICANTLY TO THE DELAYS FOR WHICH IT FAULTS ACC; THAT THE AGENCY GRANTED OTHER EXTENSIONS DOES NOT DISPROVE THAT IT SUCCUMBED TO CONGRESSIONAL PRESSURE IN DENYING ACC'S.

The *ACC Decision* concludes, in summary, that ACC took too long and accomplished too little. Thus it was shorn of the benefits of 11 years of innovation and accomplishment.

Respondent reached its adverse decision at the very time when, as detailed in the Petition, members of both houses of Congress were publicly clamoring for the FCC to auction off DBS spectrum, newly perceived as being of considerable monetary value, to the highest bidder. Petition at 5-11.[9]

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[8] *ACC Decision* (Dissenting Statement of Commissioner James H. Quello), at 11 FCC Rcd 3432.

[9] Perceptions about DBS markedly changed with the then-recent launch of the first such satellites and the unexpected popular acceptance.

Although the FCC began regulating DBS in 1982, *Direct Broadcast Satellite Service*, 90 FCC 2d 676 (1982), and ACC received a construction permit in 1984, *Satellite Syndicated Systems, Inc.*, 99 FCC 2d 1369 (1984), no definitive actions were taken during the 1980s to build or launch satellites. That seems to have been acceptable to the FCC, which concedes that for a number of years, DBS was "untried and unproven, both technically and financially." *ACC Decision*, at 11 FCC Rcd 3408. As long as permittees met

Respondent contends all this is but coincidence and that ACC was the cause of its own destruction. To prove that it was untainted by Congressional influence, the FCC argued to the D.C. Circuit that, immediately after the *ACC Decision*, it *granted* extensions to four DBS permittees who were more diligent than ACC. "If [ACC's] theory were correct," it insisted, "the Commission would have denied these extension requests to reclaim additional valuable spectrum for auction. That it did not, and that the Commission in each case carefully distinguished ACC's lack of diligence, demonstrates that the [*ACC Decision*] was properly decided solely on its merits." Brief for Appellee at 42 and n.10.[10]

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first-tier diligence thresholds per 47 C.F.R. § 100.19 (completing construction contracts within a year of receiving a permit), the agency granted them extensions of time.

In mid-1989, as technology improved and interest in the channels increased, the FCC released a new omnibus order tentatively reissuing DBS permits and announcing new processing standards. *Continental Satellite Corp.*, 4 FCC Rcd 6292 (the *"Continental Order"*). *Inter alia*, the *Continental Order* gave permittees another year to show first-tier diligence by submitting finalized construction contracts, announced its intention to apportion groups of eastern and western "half-CONUS" channel assignments on a "first-come, first-served" basis, and urged parties to combine resources through merger or buy-out. *Id.*, at 4 FCC Rcd 6293, 6299. The FCC now acknowledges that this allocation scheme was counterproductive and that it significantly delayed orbital and channel assignments. *ACC Decision*, at 11 FCC Rcd 3425; *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 1297, 1301-02 (1995).

ACC took the *Continental Order* seriously, becoming one of the first DBS permittees to meet first-tier diligence requirements and receiving orbital/channel assignments in late 1991. *Advanced Communications Corp.*, 6 FCC Rcd 2269. Since all those who were less expeditious than ACC in achieving first-tier compliance are still DBS participants, and ACC is not, it may be said that ACC paid a high price for its diligence.

[10] These cases, discussed, *infra*, are: *Continental Satellite Corp.*, 11 FCC Rcd 1157 (Int'l Bur. 1995); *Direct Broadcasting Satellite Corp.*, DA 95-2439 (Int'l. Bur., Dec. 8, 1995); *EchoStar Satellite*

This contention is unsupported by the facts. In none of the four cases could the FCC lawfully "have denied these extension requests to reclaim additional valuable spectrum for auction." Three of the four extensions were in fact necessitated by *the FCC's own prolonged inaction and delay*. Respondent's later emendations to the D.C. Circuit notwithstanding, the cases themselves show that the FCC had no choice consistent with due process but to grant the extensions; *these rulings do not disprove that, as regards ACC, the FCC violated 47 U.S.C. § 309(j).*[11]

In *Continental Satellite Corp.*, the FCC's International Bureau said candidly:

> for the past five years, CSC has been prevented from constructing its satellites by [agency] inaction . . . on its application for orbital/channel assignments. We cannot fault CSC for not having progressed further toward realization of its DBS system during the period it was awaiting government action that was a prerequisite to satellite construction. . . .

11 FCC Rcd at 1157.[12] The Bureau continued, *id.*, that: "[t]he time taken to process due diligence showings in the DBS service effectively deprived CSC of all but eight days of its six-year construction period."[13] Having im-

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Corp., 11 FCC Rcd 3017 (Int'l. Bur. 1996); and *Directsat Corp.*, 11 FCC Rcd 1775 (Int'l. Bur. 1996).

[11] The Court admonished in *N.L.R.B. v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 444 (1965), that "the integrity of the administration process requires that courts not accept appellate counsel's post hoc rationalizations for agency action. . . ." *citing Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962); and *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1955).

[12] It is unrealistic to expect meaningful construction until specific orbital slots and channels are awarded. *Continental Order; Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680 (1993).

[13] *See also Continental Satellite Corp.*, 10 FCC Rcd 10743 (Int'l. Bur. 1995): "[w]e rightly require that our permittees proceed with due diligence. Our permittees are entitled to expect that we will do the same. *In this instance, we have not*" (Emphasis added.)

peded CSC's progress for half a decade, that the Commission did not also let CSC's channels out for competitive bids scarcely entitles it to any credit here.

In *Direct Broadcasting Satellite Corp.* ("DBSC"), the FCC admitted it took *three and a half years* to make a due diligence finding. DA 95-2439, ¶ 4. It finally came less than two years before DBSC's permit was set to expire, leaving the permittee with "less than the time necessary to build a DBS satellite." *Id.*, ¶ 10. Moreover, the extension was "based in large measure upon [the timing of] DBSC's constructon schedule," not on actions it had taken to date. *Id.*, ¶ 9. Diligence, while paid lip service in the ruling, was not a predominant basis for the grant.[14]

In *Directsat Corp.*, it again took the FCC three and a half years (and until less than two years before expiration), to find due diligence and award Directstat orbital and channel assignments. 11 FCC Rcd at 1775.[15] Once again "Commission delays" prevented construction progress. *Id.*, at 1776-77.[16] These equitable factors, and not specific

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[14] In a Public Notice released February 14, 1996, the International Bureau announced that DBSC was seeking Commission approval to assign its DBS permit and channels to EchoStar. Report No. SPB-37, "SATELLITE POLICY BRANCH INFORMATION: APPLICATIONS ACCEPTED FOR FILING." Thus—unlike ACC—DBSC may be able to sell out for a profit well into its second extension term, to another entity assuming primary responsibility for construction and launch. *Compare ACC Decision*, at 11 FCC Rcd 3414 ¶¶ 39-40, 3422 ¶ 64.

[15] Less than three months later, Directsat also agreed to merge with EchoStar; see previous footnote. This merger was approved by the International Bureau in January 1995. *Directsat Corp.*, 10 FCC Rcd 88.

[16] This order contrasts Directsat's extension grant with the one denied ACC because Directsat's new construction schedule (as implemented by EchoStar) provides for satellite delivery six months before the new extension expires, whereas ACC would not have launched until more than two years after the date specified in its *original* construction schedule. 11 FCC Rcd at 1777. This is a classic "apples and oranges" comparison.

evidence of Directsat's diligence, predominate.[17]

EchoStar, the fourth post-ACC extension which the FCC relies on to disprove charges of undue influence, is arguably the most inapposite of all. EchoStar had virtually finished its satellite construction and needed only the briefest of extensions to meet its already scheduled launch. 11 FCC Rcd at 3018-19. The FCC had no rational choice but to approve it.

None of these four cases lessens even slightly the probability that the *ACC Decision* was the result of Congressional influence, sweetened by the possibility of FCC budget increases if auctions enlarged the Federal Treasury. Petition at 5-11. In three of the cases, Respondent admits that *it* and not the permittees caused the construction delays necessitating an extension. In the fourth, satellite launch was a few months away. In each, *in the only lawful decision it could make,* the FCC granted the extensions. The *ACC Decision* cannot be deemed to be reasoned decision making because the FCC canceled and auctioned off the facilities of just one permittee.

II. THE FCC HAS FAILED TO SHOW THAT "EXTRANEOUS FACTORS" DID NOT INTRUDE INTO THE DECISION MAKERS' "CALCULUS OF CONSIDERATION."

Before the D.C. Circuit, in its Brief for Appellee, at 43-44, Respondent cited *ATX, Inc. v. United States Dept. of Transp., supra,* claiming that no valid evidence exists of improper Congressional influence. *ATX* in fact compels the opposite conclusion.

The Petition, at 5-11, vividly recreates the aura of tension permeating the FCC (and the government gen-

[17] The Order does list actions purportedly taken, payments made and capital raised. 11 FCC Rcd at 1776. By this time, however, it was EchoStar and not Directsat which was performing the due diligence.

erally) during the time the *ACC Decision* was under review. It was a season of gridlock and government shutdowns, of competing partisan proposals to balance the budget, threats to abolish entire departments and agencies, and of the "Contract With America." There were repeated calls to slash the FCC's budget, or to eliminate it altogether. It was not the best of times for the Commissioners, particularly for Chairman Hundt.[18]

Spectrum auctions were widely discussed as an antidote to budgetary problems. Having tasted the *billions* that auctions could add to the Treasury, Congress demanded more. DBS was high on the list of desirable auction candidates and the only DBS spectrum which could possibly be used for the purpose was ACC's. Petition, at 5-11.

In its D.C. Circuit brief, at 43-44, Respondent finesses these vivid realities with a numbers game: fewer legislators wrote the FCC about DBS auctions than had written to the Transportation Department in *ATX*. It therefore follows —says the FCC—that there was no undue influence.

ATX, however, goes much farther than that. Improper influence is not shown merely by counting letters from legislators, but whether, overall, "extraneous factors intruded into the calculus of consideration" of the decision makers. 41 F.3d at 1527, *citing Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163, 170 (D.C. Cir. 1983) (quoting from *District of Columbia Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972)).

An administrative adjudication is invalid if based in whole or part on Congressional pressure; such interference

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[18] The Petition reports, at n.2, *inter alia*, that Senator Pressler, then Chairman of the Senate Commerce Committee, said he hoped the FCC would simply "wither away." *Wall St.J.*, March 17, 1995, at A1. It is difficult to believe the FCC Commissioners were unmoved by such rhetoric, especially when legislators were demonstrating a willingness to curtail spending by shutting down the government.

frustrates the right to due process of law. *ATX*, at 41 F.3d 1527 (Citations omitted.) In the administrative process, "the proper focus is not on the content of Congressional communications in the abstract, but rather upon the relation between the communications and the adjudicator's decisionmaking process." *Kiewit*, at 714 F.2d 169-170. Damage is done when Congressional influence shapes the agency's determination on the merits. *ATX*, at 41 F.3d 1528-29.

That Congress pressured the FCC to auction ACC's channels is undeniable; the FCC cannot say otherwise.[19] That the pressure included threats to drastically cut the FCC's operating budget or eliminate the agency altogether is also an established fact. These threats made to the FCC decision makers affected their decision making. The *ACC Decision* is the end result.

If it is shown that the *ACC Decision* departs unreasonably from previous FCC decisions, the conclusion is inescapable that "extraneous factors intruded into the calculus of consideration" of the FCC decision makers; *ATX*. The *ACC Decision* is therefore invalid.

III. THE CANCELLATION OF ACC'S CONSTRUCTION PERMIT EXEMPLIFIES "ARBITRARY TREATMENT AMOUNTING TO AN ABUSE OF DISCRETION."

Respondent will insist here as it has below that in denying ACC's extension request, it was not changing the rules of the game. That claim is dubious on its face, since the Commission has granted all other such extension requests and the disparate *ACC Decision* was rendered during the tumultous time described above and in the Petition, at 5-11.

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[19] The pressure was powerfully abetted by one prospective participant's announcement that it would open the bidding at $175 million.

Respondent insists that the *ACC Decision* is in *full accord* with its other decisions. Brief for Appellee at 26-36. Close scrutiny, however, of two other notable FCC extension rulings shows that the *ACC Decision* is not the icon of consistency the Commission contends it is.

Dominion Video.[20] Dominion received one of the first DBS construction permits, in 1982.[21] Over the next seven years, Dominion completely changed its proposal around and substituted satellite contractors; then it sought an extension of time to construct. 8 FCC Rcd at 6680-81.

The *Continental Order* (n.9, *supra*) tentatively awarded Dominion eight pairs of easterly and westerly "half-CONUS" channels. Dominion promptly appealed, arguing that it was entitled to more.[22] Four months later, Dominion proposed a reconfiguration of its system. It proffered still another reconfiguration nine months afterwards. *Id.*, at 6682.

Dominion's maneuverings over the next two years are detailed at 8 FCC Rcd 6682-85; the FCC does not pretend that ACC did anything comparable.[23] Gently put,

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[20] *Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680 (1993), *recon. denied*, 10 FCC Rcd 12743 (1995). Compare the FCC's surprisingly terse analysis of this troublesome case in its Brief for Appellee at 33-34.

[21] *DBS Systems*, 92 FCC 2d 64 (1982).

[22] The appeal was denied in *Continental Satellite Corp.*, 5 FCC Rcd 7241 (1990).

[23] For example, Dominion submitted different specifications or configurations four different times: in filings made October 13, 1989, July 5, 1990, January 13, 1991 and September 18, 1991. At least three staff requests for information went unanswered. As of December 18, 1991 (when frustrated FCC staff temporarily canceled Dominion's permit), more than 28 months had elapsed since the *Continental Order* imposed a first-tier diligence deadline of 12 months. At that point and even afterwards, numerous essential elements of Dominion's contract were not finalized. 8 FCC Rcd at 6686-87. Nevertheless, when Dominion proffered a completed con-

Dominion demonstrated little diligence, not submitting a completed contract for over two and a half years. 8 FCC Rcd at 6685. It did not approach compliance with either the *Continental Order* or 47 C.F.R. § 100.19(b).[24]

For its extended nonfeasance, Dominion did not suffer the loss of its permit. The FCC rescinded Dominion's orbital and channel assignments and put it at the back of the first-come, first-served permittee queue. 8 FCC Rcd at 6687. In simultaneously granting Dominion's second extension request, the Commission found it had "encountered some difficulties beyond its control," but that when balanced against Dominion's "significant efforts" on behalf of its system: entering into agreements for "launch services and home receiving equipment," developing a financing plan and conducting research, the "totality of the circumstances" merited a four-year permit extension. *Id.*[25] [26]

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tract months later, its permit was promptly *reinstated*. *Id.* Assuming *arguendo* the factual accuracy of the *ACC Decision*, ACC's purported inactions, which resulted in the cancellation of its permit, pale before Dominion's, which did not.

[24] *Compare ACC Decision*, at 11 FCC Rcd 3408 and n.38, and Respondent's assurance that it repeatedly "stripped" applicants of their permits for noncompliance with the first diligence tier. Not so Dominion, which remains a permittee today. Indeed, during all of the 1990s only ACC has been denied an extension.

[25] None of these actions, however, represents "any concrete progress towards the actual construction and operation of [Dominion's] DBS system." *ACC Decision*, at 11 FCC Rcd 3414. The actions which the *ACC Decision* attributes to ACC but finds insufficient to merit extension, seem very similar: "(1) the promotion of digital transmission technology; (2) the development of plans to provide educational programming; (3) advocacy of interactive service by DBS systems; and (4) participation in legislative, regulatory and publicity efforts to promote the development of DBS." *Id.*, at 3412.

[26] Dominion has since continued to try and alter its DBS proposal. On November 20, 1995, it sought to exchange two of its

Directsat.[27] In January 1995 the FCC approved a for-profit sale (contrary to its established policies) of Directstat's DBS facilities to EchoStar. It ruled that "economies of scale" in such consolidations provide "a greater likelihood of competing effectively in this emerging service. . . ." 10 FCC Rcd at 89.[28] Several months later the FCC granted Directsat's second extension request, based on construction progress by the company, now operated by EchoStar. 11 FCC Rcd 1775.

As FCC Commissioner Quello remarks in his *ACC Decision* Dissent, at 11 FCC Rcd 3433, in decisively contrasting Directstat's diligence with ACC's the majority distorts the facts: when the respective Directsat and ACC assignment requests were filed, Directsat had funded only 0.13% of its contract price but was found to be diligent; "whereas [ACC's] payments . . . were deficient because they amounted to less than one percent of the contract price."

Furthermore, while crediting Directsat for satellites to be built and funds to be provided by its purchaser EchoStar, the *ACC Decision* declined to similarly credit ACC, which was guaranteed comparable assistance by purchaser Tempo DBS, Inc. 11 FCC Rcd at 3433-34 (Quello Dissent.) These and other disparities were aptly labeled "distinctions without a difference." *Id.*, at 3432.

Reasoned Decision Making. Respondent insists that the *ACC Decision* does not represent a change of FCC policy, but instead reflects "the application of the same principles to the significantly different conduct of the permittees

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westerly channels for two unassigned easterly channels. The request was denied. *Dominion Video Satellite, Inc.*, DA 96-541 (Int'l. Bur., April 5, 1996).

[27] *Directsat Corporation*, 10 FCC Rcd 88 (1995), 11 RR 2d 1775 (Int'l. Bur. 1996). Compare Respondent's analysis in its Brief for Appellee at 30-33.

[28] Shortly thereafter, in the *ACC Decision*, the Commission viewed ACC's proposed consolidation with permittee Tempo DBS, Inc. less beneficently.

[i.e., ACC and all others] during the first extension period." Brief for Appellee at 34. The *Dominion* and *Directsat* cases refute that claim; all the DBS extensions contemporaneously granted by the FCC collectively devastate it.[20]

On the facts and the law, it is impossible to square Respondent's treatment of ACC and the other similarly situated extension applicants. Each of these visionary and hard-working permittees deserved an extension of time for their generally comparable efforts; all but one of them received it. However the FCC may strain to characterize this case, the *ACC Decision* marks a sea change from the agency's previously consistent treatment of DBS permittees.

While dispositions may evolve over time,

> an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . . and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute. . . .

Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970); *Garrett Broadcasting Service v. FCC, supra, Melody Music, Inc. v. FCC, supra.* Respondent asserts that the *ACC Decision's* 180-degree swerve does not constitute a change of policy; the facts—and the consequences—prove contrarily.

An agency's obligation to justify dissimilar treatment of similar parties is greater where new policies or emerging technologies are involved. *Green Country Mobilephone, Inc.; Adams Telcom, Inc. v. FCC*, 38 F.3d 576 (D.C. Cir.

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[20] Although an agency's failure to waive a rule will not be overturned unless its reasons are "so insubstantial as to render that denial an abuse of discretion," that heavy burden "is carried when an agency arbitrarily waives a deadline in one case but not in another." *Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235, 238 (D.C. Cir. 1985).

1994). "[J]udicial vigilance to enforce the rule of law in the administrative process is particularly crucial where, as here, the area under consideration is in a constant state of flux." *Columbia Broadcasting System v. FCC*, 454 F.2d 1018, 1025-26 (D.C. Cir. 1971) (Citation omitted.)[20]

It is settled that a reviewing court

> will not second-guess a reasoned determination by an agency that the advantages of rigidity outweigh the disadvantages in a given procedural circumstance. *See NLRB v. Washington Star Co.*, 732 F.2d 974, 977 D.C. Cir. 1984). On the other hand, once an agency agrees to allow exceptions to a rule it must provide a rational explanation if it later refuses to allow exceptions in cases that appear similar. A sometimes-yes, sometimes-no, sometimes-maybe policy . . . cannot . . . be squared with our obligation to preclude arbitrary and capricious management of [the agency's] mandate.

Green Country Mobilephone, at 765 F.2d 237.

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[20] *Green Country* concerned FCC procedural rules for cellular radio, then a new technology. The agency had refused to accept new cellular applications after the close of the filing deadline, but had accepted even less timely broadcast applications. The D.C. Circuit reversed, stating that: "[w]e cannot quarrel with the validity of the Commission's concerns. We reverse the Commission not because the strict rule it applied is inherently invalid, but because the Commission has invoked the rule inconsistently. We find that the Commission has not treated similar cases similarly." 765 F.2d at 287.

Adams Telcom involved disparate FCC treatment of applicants under its "pioneer's preference" rules, intended to reward those who develop new services or technologies. The agency summarily dismissed 15 applications as deficient, but had earlier accepted a number of comparable applications for notice and comment. The D.C. Circuit, citing *Melody Music* and *McElroy Elec. Corp. v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993), found that this was error: the Commission had neither "enumerated factual differences, if any, between appellant and the other cases . . . [nor] explained the relevance of those differences to the purposes of the Communications Act." 38 F.3d at 581.

As the *Dominion* and *Directsat* analyses amplify, ACC was at least as diligent as Directsat—*and far more diligent than Dominion*—in moving to build its system. Dominion and Directstat, however, were allowed to participate in the now highly-prized DBS arena and, on grounds which seem *de minimis*, ACC was not. These disparate decisions are " 'so inconsistent . . . as to constitute arbitrary treatment amounting to an abuse of discretion.' " *Garrett Broadcasting Service*, at 513 F.2d 1060.

The *ACC Decision* represents a profound change of FCC policy. But Respondent has been unable (indeed, has declined) to "supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored," *Greater Boston Television Corp.*, at 444 F.2d 852; and has not explained the relevance of enumerated factual differences to the purposes of the Communications Act, *Melody Music*, at 345 F.2d 733. Thus, the *ACC Decision* "cross[es] the line from the tolerably terse to the intolerably mute." *Greater Boston*, at 444 F.2d 852. Respondent's "utter failure to come to grips with this problem constitutes an inexcusable departure from the essential requirement of reasoned decision making." *Columbia Broadcasting System*, at 454 F.2d 1027. For all these reasons, the *ACC Decision* "cannot stand." *Garrett Broadcasting Service*, at 513 F.2d 1060.

CONCLUSION

Wherefore, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

DECLARATION OF WILLIAM P. WELTY, M.DIV.

My name is William Philip Welty. I am over the age of eighteen and I am a resident of the State of Nevada. I am not a party to Petitioner Advanced Communications Corporation's ("ACC") actions, either before this Court or before the Federal Communications Commission ("FCC").

I was one of the principal founders of Continental Satellite Corporation, a California corporation ("CSC"). In the Fall of 1986, on behalf of CSC I submitted an application before the FCC for authority to design, construct, launch, and operate a high-powered Direct Broadcast Satellite ("DBS") telecommunications system. As part of the fifth-round of Part 100 filings, the FCC awarded a conditional construction permit to CSC in August 1989. That permit was renewed by the FCC only one week before it was due to expire in August 1995.

During my tenure with CSC, I met and became acquainted with Dan Garner, the founder of then-DBS permittee ACC. My professional relationship with Mr. Garner remained that of a competitor in the nascent DBS industry until I retired from full-time participation in the DBS industry in March 1996 following an FCC-approved transfer of stock holdings in CSC.

REASON FOR FILING THIS AMICUS BRIEF

Even though I have been a business competitor of ACC, I was motivated to file the within AMICUS BRIEF IN SUPPORT OF PETITIONER primarily due to my commitment to see that the interests of justice are met. I have no personal or financial stake in the outcome of these proceedings other than the interests of justice.

The purpose of the instant *amicus brief* is to request that this Court grant ACC's Petition for a Writ of Certiorari. Furthermore, I ask that after agreeing to grant

ACC's Petition, the Court reverse the FCC's unjust order. As part of this reversal, I ask that this Court also order that the FCC reinstate ACC's channel assignments and order that the FCC hold ACC in due diligence so that, should he wish to do so, Mr. Garner can make arrangements either to sell ACC's permit himself or to proceed to orbit with his own DBS system utilizing a strategic partner of his own choice.

I declare under penalty of perjury this 20th day of November, 1996, that the preceding statements are true and correct to the best of my knowledge and belief.

/s/ William Philip Welty
WILLIAM PHILIP WELTY
Founder
Continental Satellite Corporation

MOTION FILED
NOV 26 1996

(5)

No. 96-479

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ADVANCED COMMUNICATIONS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE FOUNDATION FOR EDUCATIONAL ADVANCEMENT TODAY IN SUPPORT OF PETITIONER

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---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to S. Ct. Rule 37.2(b), the Foundation for Educational Advancement Today ("FEAT") moves to file the attached brief amicus curiae in support of the Petitioner. Petitioner and other parties have consented to the filing of this brief, but United States Satellite Broadcasting, Inc. has refused consent, necessitating this motion.

FEAT is a tax-exempt, charitable organization created to promote education by harnessing the enormous potential of digital satellite technologies to provide multimedia and interactive telecommunications services for use in schools and libraries across the United States. FEAT was formed in 1988 and chaired by the Hon. Wilbur D. Mills, who, along with Petitioner Daniel H. Garner, President of Advanced Communications Corporation ("Advanced"), sought to encourage and sponsor the use of Direct Broadcast Satellites ("DBS") for educational broadcasting.

To help further the goal of providing distance learning services via satellite, Advanced pledged to donate two DBS transponders to FEAT and FEAT planned to provide free DBS receivers to schools and libraries across the nation. Based on this commitment from Advanced, FEAT proposed to underwrite, in part, Your Educational Services ("YES") Networks to provide interactive educational transmissions to schools and libraries using both television and personal computer technology. Planning for the YES Networks progressed through grants FEAT received from the United States Department of Education and the State of Arkansas.[1] In conjunction with these proposals, in 1993 Advanced became the first DBS permittee to develop plans for interactive DBS service. C.A. App. 322, 439.

These educational proposals were a central feature of the Advanced DBS application. A 1992 publication by the National Association of Broadcasters characterized the Advanced DBS plan as follows:

> One of ACC's foundation strategies centers around education. The company believes that DBS will allow it to provide low-cost transmission of an unprecedented number of educational services to homes and schools anywhere in the nation. There will be two basic types of services offered—one a television-based educational course, and the other a computer-based course. Both will include seminars, educational games, and other educational materials using live instructors, video, audio, interactive multimedia, computers and other techniques. ACC believes its system vastly improves the benefit-to-cost ratio over current distance learning distribution methods.

Michael S. Alpert and Marcia L. DeSonne, DBS—THE TIME IS NOW (May 1992) at 45 (C.A. App. 744).

FEAT participated in proceedings below before the FCC, urging it to grant the Advanced requests. FEAT

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[1] *See e.g.*, U.S. Dept. of Ed., *A Program To Develop an Initial Blueprint for the YES Networks*, December 1990.

informed the Chairman and Commisioners of the FCC that Advanced had agreed to donate two transponders (which initially would provide twelve video channels) for use by FEAT and the YES Networks.[2]

FEAT agrees with the views of Advanced set forth in the petition for certiorari, and strongly believes there are additional reasons why the Court of Appeals should not have deferred to the FCC as it did. As set forth in the attached brief, both the Communications Act and the FCC's own policies are designed to encourage the provision of new technologies and services to the public and to increase educational opportunities. Yet the FCC's actions below had the inevitable effect of delaying DBS service and forestalling the development of DBS as a conduit for educational programs and services. In light of these obvious inconsistencies with the Commission's statutory mandate, the Court of Appeals should have scrutinized the FCC's actions more carefully, especially in light of the many core communications policies implicated.

Petitioner has indicated that it will demonstrate how the lure of adding huge sums to the federal treasury improperly enticed the FCC to auction the DBS spectrum originally reserved for Advanced. Moreover, the Petitioner has indicated that it will explain why the Court of Appeals' deference to the FCC, in light of this pecuniary interest, was in error. The Petitioner has not indicated that it will rely on the argument, detailed in the attached brief, that the Court of Appeals' deference was erroneous because the FCC's decision subverted key communications statutes and policies and demonstrated a failure of agency expertise. Nor has Petitioner indicated that it will rely on the argument that public statements by decisionmaking personnel tainted the validity of this adjudicatory proceeding. Because these arguments are directly pertinent

[2] Alternatively, the transponders could be used to provide hundreds of mixed multimedia channels to transmit text, CD-quality audio, computer software, graphics and other interactive programs.

to the resolution of this case but will not be adequately presented by the parties, FEAT respectfully moves for leave to file the attached brief addressed to these arguments.

Respectfully submitted,

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QUESTIONS PRESENTED

Amicus will address the following questions:

(1) Whether the Court of Appeals erred in deferring to a Federal Communications Commission decision to cancel the Advanced Communications Corporation Direct Broadcast Satellite permits where that decision is contrary to precedent and demonstrably inconsistent with Communications Act policies promoting the development of new technologies, the expedition of service, the provision of educational programming and the administration of spectrum auctions.

(2) Whether the Court of Appeals erred in deferring to the Commission's decision where the Order did not demonstrate agency expertise and the circumstances surrounding it revealed evidence of prejudgment.

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BRIEF AMICUS CURIAE FOR THE FOUNDATION FOR EDUCATIONAL ADVANCEMENT TODAY IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The Foundation for Educational Advancement Today ("FEAT") is a tax-exempt, charitable organization created to promote education by harnessing the enormous potential of digital satellite technologies to provide multimedia and interactive telecommunications services for use in schools and libraries across the United States. FEAT was formed in 1988 and chaired by the Hon. Wilbur D. Mills, who, along with Petitioner Daniel H. Garner, President of Advanced Communications Corporation ("Advanced"), sought to encourage and sponsor the use of Direct Broadcast Satellites ("DBS") for educational broadcasting.

To help further the goal of providing distance learning services via satellite, Advanced pledged to donate two DBS transponders to FEAT and FEAT planned to provide free DBS receivers to schools and libraries across the nation. Based on this commitment from Advanced, FEAT proposed to underwrite, in part, Your Educational Services ("YES") Networks to provide interactive educational transmissions to schools and libraries using both television and personal computer technology. Planning for the YES Networks progressed through grants FEAT received from the United States Department of Education and the State of Arkansas.[1] In conjunction with these proposals, in 1993 Advanced became the first DBS permitee to develop plans for interactive DBS service. C.A. App. 322, 439.

These educational proposals were a central feature of the Advanced DBS application. A 1992 publication by the National Association of Broadcasters characterized the Advanced DBS plan as follows:

> One of ACC's foundation strategies centers around education. The company believes that DBS will allow it to provide low-cost transmission of an unprecedented number of educational services to homes and schools anywhere in the nation. There will be two basic types of services offered—one a television-based educational course, and the other a computer-based course. Both will include seminars, educational games, and other educational materials using live instructors, video, audio, interactive multimedia, computers and other techniques. ACC believes its system vastly improves the benefit-to-cost ratio over current distance learning distribution methods.

Michael S. Alpert and Marcia L. DeSonne, DBS—THE TIME IS NOW (May 1992) at 45 (C.A. App. 744).

FEAT participated in proceedings below before the FCC, urging it to grant the Advanced requests. FEAT

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[1] *See e.g.*, U.S. Dept. of Ed., *A Program To Develop an Initial Blueprint for the YES Networks* (December 1990).

informed the Chairman and Commissioners of the FCC that Advanced had agreed to donate two transponders (which initially would provide twelve video channels) for use by FEAT and the YES Networks.[2] In light of Advanced's pending waiver request and assignment application, FEAT noted that Advanced "is now working with Tempo Satellite, Inc. to dedicate two transponders to educational uses as Advanced originally proposed." Letter from Richard L. Mays, Chairman, FEAT, to Reed E. Hundt, Chairman, Federal Communications Commission (Aug. 15, 1995) (C.A. App. 740). FEAT further informed the Commission that Advanced had committed to contribute $15 million to assist FEAT in providing a wide array of educational services. By denying the Advanced request, the FCC effectively ended any such plans.

STATEMENT OF THE CASE

The underlying facts and course of proceedings below are set forth fully in the brief filed by the Petitioner and will not be repeated here. As Petitioner has demonstrated, the FCC's decision to deny its extension request is deeply flawed because it places the Commission's newfound interest in becoming the "Federal Cash Cow" ahead of its statutory responsibilities. Stricter scrutiny of the Commission's decision-making process is compelled in this case because the agency's pecuniary interest compromised its ability to provide the impartial tribunal that due process requires. *See* Pet. 15-22.

But there are additional reasons why the deferential approach employed by the Court of Appeals is inappropriate. The denial of the Advanced waiver request and assignment application involves issues that go to the heart of communications policy in the United States, with an impact that extends beyond this one proceeding. For

[2] Alternatively, the transponders could be used to provide hundreds of mixed multimedia channels to transmit text, CD-quality audio, computer software, graphics and other interactive programs.

example, the Communications Act declares that "[i]t [is] the policy of the United States to encourage a provision of new technologies and services to the public." 47 U.S.C. § 157. Indeed, the FCC in the very *Order* under review confirmed that one of its "primary goals" is to "expedite the provision of additional DBS service in order to foster competition both among DBS providers and between DBS and cable."[3] The *Advanced* decision also has significant ramifications for the myriad communications policy initiatives to increase educational opportunities in the United States[4] as well as the emerging debate over the use of auction authority to allocate broadcast spectrum. *See, e.g.*, 47 U.S.C. § 309(j). Despite these statutory requirements, the FCC adopted an order *that it knew* would delay DBS service, that paid no heed at all to the effect of its decision on educational efforts available via DBS, and that directly subverted the statutory mandate of FCC auction authority.

This Court has made clear its acute awareness of "the changes taking place in the law, the technology, and the industrial structure, related to telecommunications." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2385 (1996). Other courts similarly have noted the critical importance of communications policies that "have a substantial impact on an industry that permeates the daily life of this nation and helps shape, for good or ill, our culture and our politics." *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992).

The FCC is the bureaucratic bottleneck through which these vital interests must pass, and where, as here, a single FCC decision implicates many, if not most of the

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[3] *Advanced Communications Corporation*, 11 FCC Rcd. 3399, 3401 (1995) (Pet. App. 15).

[4] *E.g.*, 47 U.S.C. § 303(b); 47 U.S.C. § 335(b)(1).

policy questions central to these changes, it is inappropriate to treat that decision as "just another case coming out of yet another agency here in town charged with making yet another broad public interest determination." *Cf. Syracuse Peace Council v. FCC*, 867 F.2d 654, 676 (D.C. Cir. 1989) (Starr, J., concurring), *cert. denied*, 493 U.S. 1019 (1990). To the extent there is a substantial governmental interest in regulating a given medium because it may exert "bottleneck" control over speech,[5] there most certainly is a vital interest in carefully reviewing agency action that also serves as a bottleneck for a wide range of speech-related concerns.

This is not to suggest that all FCC licensing or policy decisions must be subjected automatically to a heightened level of judicial scrutiny. But where, as here, a single decision lies at the intersection of core communications policies at a time of profound change, more searching review is necessary. In this unique circumstance, reviewing courts cannot defer uncritically to FCC decisions, particularly where the stated reasons for decision mask a hidden agenda that is contrary to the Communications Act and the public interest, and where public statements by decisionmaking personnel suggest that there was a less than impartial tribunal. More thorough review of the misuse of the Commission's broad discretion in this case is not just a requirement of due process, it is good civic hygiene.

SUMMARY OF ARGUMENT

The Commision's decision in *Advanced Communications Corp.* is diametrically opposed to its well-established policies regarding the promotion of new technologies, the need to expedite DBS services, the interest in promoting educational programming and the administration of spectrum auctions. Such inconsistencies survived judicial

[5] *Turner Broadcasting System v. FCC*, 114 S. Ct. 2445, 2466 (1994).

review only because the Court of Appeals declined to look beyond the text of the FCC *Order*, and deferred completely to the Commission's judgment. However, such deference is inappropriate where key concepts were left unexplained, key evidence overlooked, arguments that formerly persuaded the Commission were ignored and contradictions within and among Commission decisions were passed over in silence. The FCC's purported distinctions with prior cases were utterly unsupported by the record.

Additionally, the Court of Appeals erred by deferring to the FCC's decision where the *Order* revealed a failure of expertise and where a disconcerting number of public comments on the merits of this adjudicatory proceeding were made by decisionmaking personnel. The reviewing court should have more closely examined the process and voided the Commission decision where such behavior compromised both the appearance and the substance of due process.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN DEFERRING TO A COMMISSION DECISION THAT IS CONTRARY TO PRECEDENT AND DEMONSTRABLY INCONSISTENT WITH COMMUNICATIONS ACT POLICIES.

The FCC's *Advanced* decision unveiled a regulatory world in which up is down and black is white. In pursuit of its "primary goal" of expediting the provision of additional DBS service, *Advanced Corp.*, 11 FCC Rcd. at 3401, the FCC eliminated a DBS permitee who was on the verge of initiating competitive service and adopted an auction plan that the Commission knew would delay service, perhaps for years.[6] It is not known exactly how much

[6] *See* 11 FCC Rcd. at 3430 (Dissenting Statement of Commissioner James Quello) ("[t]he practical public interest result of the majority decision [is that] the date for the arrival of first-ever

delay in expanding competitive DBS service the FCC caused by revoking Advanced's permits, but there appears to be a consensus that the period must be measured in years.[7]

At the same time, even as the Commission has proclaimed repeatedly its vital interest in promoting educational opportunities for school children through a variety of communications policies, it ignored the efforts of Advanced and FEAT to provide innovative educational programs via interactive technologies and DBS frequencies. And in the face of a categorical statutory prohibition against deciding to auction spectrum based upon the potential revenues it might raise, 47 U.S.C. § 309(j)(7)(A), the FCC canceled the Advanced permits, noting repeatedly its desire to "recover for the public a portion of the value of the public spectrum resource made available for commercial use." *Advanced Corp.*, 11 FCC Rcd. at 3424 & n.127 (Pet. App. 48).

DBS service to Alaska and Hawaii is unclear; and additional multichannel video programming competition from another DBS provider will be delayed."); *Id.* at 3439 (Dissenting Statement of Commissioner Andrew Barrett) ("I am convinced that today's decision . . . will considerably delay additional DBS service to the public."); *Id.* at 3441 (Separate Statement of Commissioner Susan Ness) (arguments that "canceling the construction permit will disrupt business plans of a number of parties . . . certainly [have] some merit"); *Id.* at 3444 (Separate Statement of Commissioner Rachelle Chong) (noting the "additional delay associated with recovery of the spectrum" and hoping that such delay "can be minimized").

[7] *See* Donald K. Dement, THE DBS REVOLUTION 39 (National Assn. of Broadcasters, Oct. 1996) ("From [the *Advanced*] decision a two-year delay resulted in DBS operation at this prime slot while MCI builds its satellites."); *DirecTV, Inc. v. FCC*, No. 96-1001 (D.C. Cir. 1996) (in appeal of FCC auction decision following *Advanced*, EchoStar has argued that it will take MCI up to six years to build and launch satellites). *See also In Oral Argument, Satellite Companies Call for Remand of DBS Auction Rules*, THE CABLE-TELCO REPORT (Oct. 21, 1996) at 13-15.

Despite these obvious inconsistencies, the Court of Appeals applied an exceedingly deferential standard of review. Pet. App. 5. The court accepted at face value the Commission's conclusory statements regarding its public interest goals and failed to question the FCC's mischaracterizations of the record that supported its erroneous distinctions between cases. The Court's analysis did not look beyond the "text of the Order," Pet. App. 9, even though it was obvious from the record that the *Order*'s text was more pretext than it was a careful weighing of the facts before the agency.

Even in cases that do not implicate the range of critical issues found here, the "presumption of agency regularity," *Louisiana Ass'n of Independent Producers v. FERC*, 958 F.2d 1101, 1111 (D.C. Cir. 1992), does not immunize the Commission from the rules of logic or the requirement that issues be honestly evaluated. The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). Blind references to an agency's expertise "cannot be used as a cloak for fiat judgments" that "ignore[] direct evidence" in the record or create "intolerable conflict[s]" with prior decisions. *Tennessee Gas Pipeline Co. v. FERC*, 926 F.2d 1206, 1210, 1211 (D.C. Cir. 1991). The deference owed an expert agency "cannot be allowed to slip into a judicial inertia," *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983), and courts must not "rubber-stamp . . . administrative decisions [that are] inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute." *NLRB v. Brown*, 380 U.S. 278, 291-292 (1965). *See Allied Chemical & Alkali Workers v. Pittsburgh Plateglass Co.*, 404 U.S. 157, 166 (1971).

A reviewing court must determine whether an agency "has relied on factors which Congress has not intended

it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. *See also Schurz Communications, Inc.*, 982 F.2d at 1050.

In short, principles of administrative review do not require judicial blindness to the real world efforts of Commission decisions. In this case, however, the Court of Appeals elevated administrative boilerplate over reality, approving without serious review conclusory statements that were flatly contradicted by record evidence, and upheld policy outcomes at odds with precedent and Communications Act mandates. Specifically, the court agreed with the Commission's conclusion that the public interest required sacrificing expedited service that would flow from granting the Advanced request in exchange for theoretical gains in service that would flow from stricter (albeit highly selective) enforcement of due diligence guidelines.

However, the course of proceedings before the Commission should have alerted the Court of Appeals that the goal of expediting service was of little importance to the FCC. The matter languished before the agency for over five months despite the fact that all parties stressed the need for expedited review.[8] Tellingly, the decision was made less than a week after one of the parties—MCI Communications Corporation—filed a two paragraph letter with the Commissioners in which it "reaffirm[ed] its commitment to participate in the auction and . . . submit an opening bid of $175 million." C.A. App. 768. This promise of money played a critical role in the FCC's deci-

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[8] C.A. App. 544, 561-562, 600-601. Although the applications for review were filed with the Commission by mid-May, 1995, and the pleading cycle completed by mid-June, the matter sat before the agency without action for four months, until October 16.

sion.[9] The smoking gun was revealed in a subsequent speech by Chairman Reed Hundt in which he boasted that "[w]e intended all along [in the *Advanced* case] to raise in auctions of the airwaves more money than Bill Gates has." Reed E. Hundt, *Speech to the Artist's Rights Foundation* (Feb. 15, 1996) (as prepared for delivery).

Even if the Commission had acted expeditiously, its stated rationale cannot withstand scrutiny. No deference is required where an agency decision consists of "boilerplate" recitation of claims that the agency has fully considered the evidence but where in fact "[k]ey concepts are left unexplained, key evidence is overlooked, arguments that formerly persuaded the Commission and that time has only strengthened are ignored, [and] contradictions within and among Commission decisions are passed over in silence." *Schurz Communications, Inc.*, 982 F.2d at 1050. Indeed, when the Commission's proffered distinctions between this and other DBS cases are "[s]tripped of verbiage," the *Advanced* decision, "like a Persian cat with its fur shaved, is alarmingly pale and thin." *Id.*

The Court of Appeals should have been more rigorous in its review since the Commission's reasoning flatly contradicted its established policies in this area. The FCC had urged applicants to "combine assignments and resources through merger or buyout" (just as Advanced and Tempo proposed) in order to enhance the technical and commercial viability of DBS.[10] Moreover, the Commis-

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[9] Not only was this $175 million figure noted in the Commission's decision to revoke the Advanced permits, Pet. App. 48 n.127, but Commissioner Andrew Barrett wrote in the companion decision to auction the spectrum that a fellow Commissioner had approached him to ask whether MCI's promised bid "would persuade me that auctioning ACC's channels was appropriate." C.A. App. 160 n.5. The "pledge" of $175 million was mentioned repeatedly in the auction proceeding. *Id.* at 136 n.123, 137 n.129, 142, 143 n.147, 160 & n.4.

[10] *See Continental Satellite Corp.* 4 FCC Rcd. 6292, 6299 (1989).

sion had granted extensions of time to applicants who held their DBS authorizations longer than Advanced;[11] it had granted multiple extension requests to other applicants;[12] and it had approved transfers and extensions of time for unbuilt DBS construction permits.[13] Indeed, the FCC had granted every request for an extension of time to construct DBS facilities before the *Advanced* decision, and it has granted every request since.

Ultimately, the FCC's public interest finding, that the *Advanced* decision would "expedite" DBS service, boiled down to a single assertion: that the decision was necessary to prevent "warehousing" of spectrum. This assertion, however, would have crumbled under the slightest scrutiny of the FCC's prior decisions and the facts in the record, if the court had subjected it to such review. The FCC's contradictory position was highlighted by its decision in *Directsat Corp.*, which the Court of Appeals agreed is "a more difficult case." Pet. App. 7. In reviewing the FCC's decision in *Advanced*, the court unquestioningly accepted the FCC's claims that Directsat made "steady and consistent [progress] with the schedule established in its construction contract," while Advanced "consistently delayed the schedule established in its construction contract." Pet. App. 7.

But the Commission's conclusory characterization was an utter distortion of the facts in the record. Indeed, Directsat's due diligence filings at the FCC revealed that it amended its satellite contract seven times and its payment schedule at least four times. Its first major payment

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[11] *U.S. Satellite Broadcasting Co.*, 3 FCC Rcd. 6858 (1988); *Dominion Video Satellite, Inc.*, 3 FCC Rcd. 6858 (1988).

[12] *U.S. Satellite Broadcasting Co.*, 7 FCC Rcd. 7247 (Video Services Div. 1992) ("*USSB II*"); *Dominion Video Satellite, Inc.*, 8 FCC Rcd. 6680 (1993) ("*Dominion II*").

[13] *Directsat Corp.*, 10 FCC Rcd. 88 (1995); *Directsat Corp.*, FCC File No. 131-SAT-EXT-95 (International Bureau, released Jan. 11, 1996) (C.A. App. 279).

deadline was put off successively, and no payment was ever made before the FCC approved the transfer of control of the construction permit to EchoStar. Directsat had paid only one eighth of one percent of the contract price of the satellites, and because of repeated extensions, *never* commenced construction. C.A. App. 605-607. Directsat had never proposed to provide any DBS programming itself on its satellite, but from the beginning had planned to "lease all its transponder capacity to program packagers and other businesses." [14] Directsat simply sold its bare authorization to EchoStar within a few months of receiving its channel assignments from the FCC.

By sharp contrast, Advanced pursued its application over the long term, proposed the implementation of digital transmission technology which became the industry standard, developed ambitious plans for educational services to America's schools and worked with FEAT to promote the use of DBS technology for educational and informational purposes. C.A. App. 437-441. The record also made clear that ACC had made greater progress toward bringing its proposal to fruition having expended in excess of $7 million in connection with the construction permit for its DBS system, C.A. App. 764, and had worked with its satellite contractor "to design, develop, and construct ACC's Direct Broadcast Satellite ("DBS") system." [15]

In short, all of the indicia of "warehousing" spectrum—the purported basis for distinguishing *Directsat* from *Advanced*—applied clearly to Directsat, an applicant that did not intend to use transponders for its own programming, made no technical innovations, repeatedly delayed its construction schedule, never commenced construction

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[14] *Continental Satellite Corp.*, 4 FCC Rcd. at 6296.

[15] Letter from Steven D. Overly, General Counsel, Lockheed Martin to Chairman Reed E. Hundt (September 25, 1995) (C.A. App. 766).

and immediately sold its permit upon receiving its authorization. By contrast, Advanced was branded as a spectrum speculator despite the fact that it had pioneered DBS technology, fought for technical changes that became the industry standard, developed innovative programming formats, expended significant resources and made construction progress. It is, as senior FCC Commissioner James H. Quello wrote in dissent, "somewhat akin to rewarding a survivor of the Charge of the Light Brigade by putting him in front of a firing squad." Pet. App. 72.

Deference to the Commission's decision also is inappropriate because the agency "entirely failed to consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. The FCC completely ignored the long-term promotion of educational programming on DBS by Advanced and FEAT. FEAT had worked with Petitioner since the mid-1980s to develop innovative ways to deliver educational programming to every school, library and home in America. Toward that end, Advanced had agreed to donate two transponders for use by FEAT and the YES Networks, and had pledged $15 million to FEAT in support of these efforts. C.A. App. 740-741. FEAT notified the Commission that "ACC is now working with Tempo Satellite, Inc., to dedicate two transponders to educational uses as Advanced originally proposed." *Id.* at 740.

Such educational initiatives are a core component of the public interest, as the FCC has emphasized repeatedly in recent years. Quoting the legislative history to the Children's Television Act, the Commission recently described this interest as "compelling," and stated "[i]t is difficult to think of an interest more substantial than the promotion of the welfare of children who watch so much television and rely upon it for so much of the information they receive." [16] Such public interest concerns

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[16] *Policies and Rules Concerning Children's Television Programming*, FCC 96-335 (released Aug. 8, 1996), ¶ 154, (quoting S. Rep.

have not been limited to rulemaking proceedings; the FCC also has promoted educational programming in connection with its approval of other waiver requests. Indeed, just one month after the Commission canceled the Advanced authorization, it granted an ownership waiver request associated with the CBS, Inc./Westinghouse Electric Corporation merger, in part because Westinghouse had "made a voluntary commitment to augment the amount of children's programming broadcast over the CBS network and its owned and operated stations." *See Stockholders of CBS, Inc.*, 11 FCC Rcd. 3733, ¶ 60 (released Nov. 22, 1995). Similarly, the FCC has relaxed cable television rate regulations where operators have pledged to provide service connections and other benefits to public schools.[17]

Given the Commision's fixation on using its regulatory processes to promote educational initiatives, it is all the more perplexing that the FCC failed *even to mention* the proposal for educational programming presented to it in the *Advanced* proceeding. Instead, MCI's proposed $175 million bid loomed larger in the Commission's mind, and was quoted repeatedly in the *Advanced* Order and in the FCC's associated auction rulemaking proceeding. In this single action, the FCC subverted both its core public interest responsibilities regarding educational programming as well as the statutory prohibition against making monetary considerations the fulcrum of Commission public interest determinations. In such circumstances, the deferential treatment accorded the Commission by the Court of Appeals was highly inappropriate.

No. 227, 101st Cong., 1st Sess. 17 (1989)). *See also* 47 U.S.C. § 254(h) (establishing special rates for telecommunications services for educational institutions).

[17] *E.g., Continental Cablevision, Inc.*, FCC 96-358 (released Aug. 23, 1996) (amended social contract); *Social Contract for Time Warner*, 11 FCC Rcd. 2778 (1995).

II. THE COURT OF APPEALS ERRED IN DEFERRING TO THE COMMISSION'S DECISION WHERE THE ORDER DID NOT DEMONSTRATE AGENCY EXPERTISE AND THE CIRCUMSTANCES SURROUNDING IT REVEALED EVIDENCE OF PREJUDGMENT.

The Court of Appeals also erred in deferring to the Commission's decision because deference is inappropriate where an agency "simply has not exercised its expertise." *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1505 (D.C. Cir. 1986). In the decision under review, the Commission exhibited a marked *lack* of expertise combined with troubling indications of prejudgment of the issues. Accordingly, the FCC's decision should have been subjected to more rigorous review.

From the beginning, there were danger signals that the Commission's expertise was at a low ebb in the *Advanced* proceeding. The initial decision by the International Bureau misconstrued Commission precedent that had established a more flexible standard for evaluating DBS extension requests, stating that the FCC had denied extension requests for two DBS permitees when, in fact, the agency had granted both requests.[18] In its attempt to explain away this gross error, the full Commission acknowledged the mistake, but claimed that "[t]his misstatement does not detract from the logic of the order." *Advanced Corp.*, 11 FCC Rcd. at 3410 n.54 (Pet. App. 28). Unfortunately, the Commission compounded the error by basing its decision on the fictitious distinction between Directsat (which it claimed made "steady and consistent [progress] with the schedule established in its construction contract" despite its repeated delays and lack of construction), *id.* at 3420 (Pet. App. 42-43), and Advanced, whose progress the Commission ignored.

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[18] *See Advanced Communications Corporation*, 10 FCC Rcd. 13337, 13340-41 (International Bureau 1995) (quoting *USSB I*, 8 FCC Rcd. at 6859) (Pet. App. 85-86).

The lapses of Commission expertise are even more serious in this case because of the disconcerting habit by key decisionmakers of making statements to the press regarding the merits of an ongoing adjudicatory proceeding. For example, Scott B. Harris, Chief of the Bureau that originally had misunderstood Commission precedent, further demonstrated a failure to grasp the record, telling BUSINESS WEEK during the proceeding that "You can't just take a public asset, not do anything with it, and then go off to the beach." *See A Windfall Lost in Space*, BUSINESS WEEK, July 17, 1995, at 38. Similarly, Chairman Reed Hundt was quite vocal about the decision both in press interviews and public speeches. In one interview, given before the decision was officially released, the Chairman revealed that he met with the chairman of MCI shortly before that party announced its $175 million bid (thus explaining why the MCI letter filed with the Commission "reaffirmed" an intention not previously disclosed on the record). Chairman Hundt added that he spoke with TCI and Primestar after receiving MCI's "pledge" letter, explaining that "[i]f you have anything to say you'd better do so in the next few hours or days because I intend to make a decision."[19] Chairman Hundt subsequently made a number of speeches in which he joked about the financial motivation underlying the *Advanced* decision.[20]

Not only are such public statements unseemly when made by decisionmaking personnel in the course of an adjudicatory proceeding, the case law is clear that a decision is tainted if such statements suggest that a Commis-

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[19] *See Hundt Explains Call for Auction*, SATELLITE BUSINESS NEWS, Oct. 25, 1995, at 25, 26. *See also Fate of FCC DBS Decision Uncertain in Face of Potential Hill Action*, COMMUNICATIONS DAILY, Sept. 15, 1995, at 3.

[20] Reed E. Hundt, *Speech to the Artist's Rights Foundation* (Feb. 15, 1996) (as prepared for delivery) ("We intended all along [in the *Advanced* case] to raise in auctions of the airwaves more money than Bill Gates has."). *See* Gary Samuels, *Gore-ing Malone's Ox*, FORBES, Sept. 9, 1996, at 56.

sioner " 'has in some measure adjudged the facts as well as the law in a particular case in advance of hearing it.' " *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959)). It is well established that such public statements violate both the appearance and the substance of due process. *Stivers v. Pierce*, 71 F.3d 732, 746-748 (9th Cir. 1995); *Antoniu v. SEC*, 877 F.2d 721, 724-726 (8th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

Where, as here, "statements on the merits" were made by those who were called upon to make "factual determinations on contested fact issues," the proceeding is not attended " 'with every element of fairness,' " as is required, or even the " 'appearance of complete fairness.' " *Antoniu*, 877 F.2d at 724-725 (quoting *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965) (*per curiam*)). The unusual public discussion of adjudicatory issues by decisionmaking personnel in this case should have tipped off the Court of Appeals that greater scrutiny was required. *See, e.g., United Church of the Medical Center v. Medical Commission*, 689 F.2d 693, 698-700 (7th Cir. 1982).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ADVANCED COMMUNICATIONS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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1. Respondents accuse Advanced [1] of not having made in the court below the heightened scrutiny argument it presents in its petition for certiorari. *See* FCC Br. 12; MCI Br. 10-11. That meritless accusation could only have been made by someone who knew that the reader of the petition would not have Advanced's court of appeals briefs on hand.

In the court below, Advanced clearly argued, in every brief it submitted, that the government's financial stake in the decision to revoke Advanced's permit warranted a stricter standard of review. Advanced argued that

> when the Government has a pecuniary interest in the outcome of an adjudication, its decision is not entitled

[1] Petitioner's Rule 29.6 statement appears at Pet. ii.

> to ordinary deference, but rather must receive close judicial scrutiny. *See, e.g., United States* v. *James Daniel Good Real Property*, [510 U.S. 43, 56] 114 S. Ct. 492, 502 (1993) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit") (quoting *Harmelin* v. *Michigan*, 501 U.S. 957, 978 n.9 (1991) (opinion of Scalia, J.)). *Cf. United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 26 (1977) ("[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate [where] the State's [financial] self-interest is at stake"); *United Church of the Medical Center* v. *Medical Comm'n*, 689 F.2d 693, 698-700 (7th Cir. 1982) (agency's financial interest in the outcome of an adjudicatory proceeding held to disqualify agency as decision maker). [Advanced's Opening Br. 28-29; first set of brackets added here].

See also Reply Br. 7-8; Pet. for Reh'g 2-3, 8-10.

The only truth to respondents' protestations is that Advanced did not rely in the court below on some of "the cases on which it now relies." MCI Br. 10.[2] But there is certainly no rule restricting parties in this Court to the same authorities they relied upon below. *Cf. Elder* v. *Holloway*, 510 U.S. 510 (1994). And as this Court has said, the "traditional rule" is that " '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.' " *Lebron* v. *National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995) (quoting *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992)). In any event, the argument that Advanced made in the court below is essentially the same as the one it makes here.

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[2] The FCC incorrectly asserts that Advanced has raised a new "due process claim." FCC Br. 12. Advanced's claim is and always has been that the FCC's decision in this case was in violation of the Administrative Procedure Act, 5 U.S.C. § 706, *under which* heightened scrutiny is required for reasons rooted in the Due Process Clause, 47 U.S.C. § 309(j)(7)(A), and the APA itself. *See infra* at 8-5.

2. On the merits of Advanced's heightened scrutiny claim, respondents, using a divide and conquer strategy, argue that neither the Administrative Procedure Act, nor 47 U.S.C. § 309(j)(7)(A), nor the Due Process Clause, standing alone, requires heightened scrutiny of the FCC's decision in this case. *See* FCC Br. 10-16; MCI Br. 8-15. The error in their approach is the examination of each source of law in isolation from the others. As a result, respondents fail to see how the three logically interact to require heightened scrutiny here.

The APA requires a reviewing court to set aside an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). While ordinarily a deferential standard of review, "the intensity of review under this standard is certainly not immutable." *Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983). Indeed, "[m]ore aggressive review under the arbitrary and capricious standard may be appropriate in any number of circumstances." *Id.* at 1425 n.23. *See also National Cable Television Ass'n* v. *Copyright Royalty Tribunal*, 724 F.2d 176, 181 (D.C. Cir. 1983); *Cape May Greene, Inc.* v. *Warren*, 698 F.2d 179, 190 (3d Cir. 1983).

One circumstance in which "[m]ore exacting scrutiny" is appropriate under the APA is when the agency decision under review is infected by bias. *Natural Resources Defense Council, Inc.*, v. *SEC*, 606 F.2d 1031, 1049 n.23 (D.C. Cir. 1979); *Maggard* v. *O'Connell*, 671 F.2d 568, 571 (D.C. Cir. 1982); *Office of Communication*, 707 F.2d at 1425 n.23. In 47 U.S.C. § 309(j)(7)(A), Congress clearly expressed the view that certain FCC decisions should not be based on "the expectation of Federal revenues" from auctions.[8] Congress realized that, without

[8] For an agency decision to pass muster under the APA, "[s]ection 706(2)(A) requires a finding that * * * the decision was based on a consideration of the relevant factors." *Citizens to Preserve*

such a requirement, revenue considerations could improperly bias the FCC's decisions. *See* H.R. Rep. 103-101, 103d Cong., 1st Sess. 258 (1993) (quoted in Pet. 14). Here, the record establishes that in revoking Advanced's permit the FCC expressly factored into its decision the significant revenues that an auction of Advanced's spectrum would realize. *See* Pet. App. 48a & n.127 (noting MCI's opening bid of $175 million for the spectrum); Pet. 10-11.

The Due Process Clause, too, requires heightened scrutiny of the FCC's decision. As explained in the petition, this Court's cases establish that a governmental decisionmaker may not have a pecuniary interest in the outcome of his own decisions. *See* Pet. 15-16.[4] Furthermore, *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993), holds "that where there is a danger that an initial decisionmaker is biased, due process requires nondeferential review of its decision." Pet. 18. There, this Court held that to afford a biased decisionmaker "a great deal of deference" upon review of his decision would present "a substantial question of procedural fairness under the Due

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Overton Park, Inc. v. *Volpe*, 401 U.S. 402, 416 (1971). Thus, the APA is violated "if the agency has relied on factors which Congress has not intended it to consider." *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The revenues that an auction of Advanced's spectrum might bring plainly were not relevant to the FCC's decision in this case. *See* 47 U.S.C. § 309(j)(7)(A).

[4] The FCC's claim that this line of cases applies only to informal, unreviewable decisions by solitary decisionmakers (FCC Br. 13-14) is demonstrably false. *See Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986) (decision of nine member state supreme court violated due process); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973) (decision of multimember optometry board violated due process); *Ward* v. *Village of Monroeville*, 409 U.S. 57, 61-62 (1972) (rejecting the argument that bias in adjudication by mayor "can be corrected on appeal and trial *de novo* * * * Petitioner is entitled to a neutral and detached judge in the first instance").

Process Clause." 508 U.S. at 625, 626. Neither the FCC nor MCI disputes this.

3. Contrary to respondents' assertions (FCC Br. 13; MCI Br. 11), it is clear that, to have a bias within the meaning of this Court's cases, a governmental decisionmaker need not stand to profit personally and financially from the decision.[6] The test, rather, is whether the governmental adjudicator is "in a situation which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true." *Concrete Pipe*, 508 U.S. at 617-618 (quotation marks and ellipses omitted). For the reasons explained in the petition, there can be no doubt here that the FCC had powerful political and institutional reasons to revoke Advanced's permit and auction its spectrum. *See* Pet. 6-7, 16-17.

4. Respondents resort quickly and often to the last refuge of those who would defend indefensible agency action—the presumption of agency regularity. *See* FCC Br. 11, 16-19; MCI Br. 4-7. From their briefs, one would think that the presumption is the end of the analysis, rather than the beginning. The record in this case simply overcomes the initial presumption of proper agency decisionmaking.

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[6] *See Ward*, 409 U.S. at 62 (White, J., dissenting) ("The Ohio mayor who judged this case had no direct financial stake in its outcome."); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 250 (1980) ("the prospect of institutional gain" can cause bias); *Aetna Life*, 475 U.S. at 829-830 (Brennan, J., concurring) ("Nonpecuniary interests" can cause bias; it is enough that the suspect decision "substantially advances the judge's opportunity to attain some desired goal"); *R.L. Augustine Constr. Co.* v. *Peoria Unified Sch. Dist.*, 904 P.2d 462, 467 (Ariz. App. 1995) ("institutional pecuniary interest will violate due process"), *rev. granted* (Oct. 24, 1995); *Trust & Investment Advisers, Inc.* v. *Hogsett*, 43 F.3d 290, 295 (7th Cir. 1994) (this Court's cases "encompass not only those adjudicators with significant, personal financial stakes in the outcome of their cases").

The FCC voted 3-2 to revoke Advanced's permit, with the dissenting votes cast by the two most senior FCC commissioners. The deciding vote was cast by Chairman Reed Hundt, the only commissioner who neither dissented nor wrote separately from the FCC's opinion and order. *Cf. Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 828 (1986) (financially interested state supreme court justice cast "deciding vote" in 5-4 decision). There is substantial evidence that the Chairman's vote was improperly driven by his desire to auction off Advanced's spectrum for hundreds of millions of dollars. As noted in the petition (Pet. 6-7 & n.2, 12), Chairman Hundt has displayed in public statements an undisguised fervor for auction revenues.[6] Although one might dismiss Chairman Hundt's general expressions of his revenue-raising agenda, he expressed the very same views in connection with the auction of Advanced's spectrum itself. *See id.* at 12 (the "who am I kidding?" speech).[7] The Chairman also publicly acknowledged—the day *before* the FCC officially released its decision in this case—that he was influenced by Congress' open desire for the FCC to auction Advanced's spectrum for revenue. *See id.* at 11. It is noteworthy that the FCC does not dispute any of this. *See* FCC Br. 17 n.7. In sum, the record in this case demonstrates a "proba-

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[6] The Chairman's zeal for auction revenues has landed his agency in an enduring icon of popular culture. *See* THE GUINNESS BOOK OF RECORDS 380 (1996 ed.) (noting that the FCC holds the world record for the most lucrative public auction, which occurred on Chairman Hundt's watch in 1995).

[7] Public speeches delivered by federal agency commissioners have been held to constitute proof of unconstitutional bias against a party aggrieved by an agency ruling. *See Antoniu* v. *SEC*, 877 F.2d 721, 724-725 (8th Cir. 1989) (SEC commissioner), *cert. denied*, 494 U.S. 1004 (1990); *Cinderella Career & Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583, 589-592 (D.C. Cir. 1970) (FTC chairman); *Texaco, Inc.* v. *FTC*, 336 F.2d 754, 759-760 (D.C. Cir. 1964) (same), *vacated on other grounds*, 381 U.S. 739 (1965) (per curiam).

bility of actual bias * * * too high to be constitutionally tolerable." *Withrow* v. *Larkin,* 421 U.S. 35, 47 (1975).[8]

5. Respondents fret that acceptance of Advanced's position would require heightened scrutiny of the many governmental decisions implicating revenue collection. *See* FCC Br. 11; MCI Br. 13-14. The horribles that they parade, however, are neither very scary nor apt to march very far. Several things about the FCC's revocation of Advanced's permit set it apart from the garden variety government decision affecting revenue. First, unlike in, say, a Treasury Department tax policy ruling, revenue generation was not a permissible consideration in this case. *See* 47 U.S.C. § 309(j)(7)(A). Second, Advanced has demonstrated more than a general interest on the part of the agency involved in raising revenue. Advanced has shown that the specific agency decisionmaker who cast the deciding vote had a strong interest in reaching the result that would generate revenue. Third, a truly staggering sum of money —$735 million—was at stake here; this sets the case apart from the run-of-the-mill government decision.

In any event, there is much to be said for stricter scrutiny of those decisions in which the government has a pecuniary interest. *See James Daniel Good,* 510 U.S. at 55-56. "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness * * * by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance

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[8] Respondents claim that the extensions the FCC granted after it denied one to Advanced prove that the FCC was not motivated by revenue considerations in this case. *See* FCC Br. 18-19; MCI Br. 6. Those extensions, however, were granted to permittees with spectrum allocations far less valuable than Advanced's. *See* Advanced's C.A. Reply Br. 5.

that the arbiter is not predisposed to find against him." *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

6. Finally, the assertion that this case is a "poor candidate" (MCI Br. 3) for review cannot pass without a response. Two of the reasons for the purported poverty of the case—that the decision below was unpublished and unanimous—have not stopped this Court from granting certiorari in other recent cases.[9] These considerations are no impediment to review by this Court. *See Commissioner* v. *McCoy*, 484 U.S. 3, 7 (1987) ("We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The court of appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished."). MCI's third reason—that "no conflict among the lower courts is even alleged" (MCI Br. 3)—is simply false. In the petition, Advanced explained that the decision below conflicts with the decisions of "other courts recognizing, in a wide variety of contexts, that heightened scrutiny is appropriate when the government has a financial stake in the action under review." Pet. 19 (citing cases). Neither respondent disputes this proposition in its brief; nor could they. *See id.* at 19-21 (discussing the conflict).

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[9] *See, e.g., Lane* v. *Pena*, 116 S. Ct. 2092, 2096 (1996); *Behrens* v. *Pelletier*, 116 S. Ct. 834, 838 (1996); *Things Remembered, Inc.* v. *Petrarca*, 116 S. Ct. 494, 496 (1995); *Williamson* v. *United States*, 114 S. Ct. 2431, 2434 (1994); *Thomas Jefferson Univ.* v. *Shalala*, 114 S. Ct. 2381, 2386 (1994); *MCI Telecomm. Co.* v. *AT&T*, 114 S. Ct. 2223, 2228 (1994); *Ibanez* v. *Florida Dep't of Bus. & Prof'l Reg.*, 114 S. Ct. 2084, 2088 (1994); *Howlett* v. *Birkdale Shipping Co.*, 114 S. Ct. 2057, 2062 (1994); *Farmer* v. *Brennan*, 114 S. Ct. 1970, 1976 (1994).

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ADVANCED COMMUNICATIONS CORPORATION

Petitioner

vs.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICI CURIAE BRIEF OF THE STATE OF ARKANSAS AND CITY OF LITTLE ROCK IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES THE COMMUNICATIONS ACT, 47 U.S.C. §309, VIOLATE PROCEDURAL DUE PROCESS WHEN, ON THE ONE HAND, THE STATUTE REQUIRES THE FEDERAL COMMUNICATIONS COMMISSION TO ADJUDICATE THE GRANT OR DENIAL OF LICENSES ON THE BASIS OF WHETHER THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY WILL BE SERVED, AND ON THE OTHER HAND, THE STATUTE ALLOWS THE FEDERAL COMMUNICATIONS COMMISSION TO RETAIN PROCEEDS FROM AUCTIONS OF THE LICENSES IN A FUND FOR THE SALARIES AND EXPENSES OF THE COMMISSION?

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INTERESTS OF AMICI CURIAE

This Amici Curiae Brief is filed pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States. The State of Arkansas and the City of Little Rock, who are Amici Curiae in the present case, have interests that are both substantial and different than the interests of the petitioner, Advanced Communications Corporation ("ACC"). ACC has a private, economic interest in the outcome of this case. The amici, however, have state and local interests in the guarantee of educational broadcasting on direct broadcast satellite ("DBS") systems, the development of high technology employment and an improved business climate in Arkansas, and the fair exercise of federal power by an agency with regulatory authority

affecting the State's and City's interests. The Amici's interests as applied to this proceeding weigh in favor of granting the petition.

I.

STATE INTERESTS ARE JEOPARDIZED.

On or about October 16, 1995, the Federal Communications Commission ("FCC") affirmed its International Bureau's finding that ACC was not entitled to an extension of time in which to construct, launch, and operate its DBS system. The FCC's decision effectively denied ACC a permit to use a broadcast spectrum, a permit ACC initially acquired in December 1984. Prior to the FCC's denial of ACC's extension to use a DBS spectrum, ACC had committed itself to dedicating part of the spectrum to educational programming. In addition ACC's operations were to be based in Arkansas and would create high technology jobs and a business climate that would spawn related economic growth in the State. Consequently, in addition to terminating ACC's right to use a DBS broadcast spectrum, the FCC's decision jeopardizes important state and local interests in both educational broadcasting and economic development.

A. EDUCATIONAL BROADCASTING IS A STATE INTEREST.

The State of Arkansas and the City of Little Rock have a strong interest in educational broadcasting. "Society has a compelling interest in having all children educated in order that they may become good citizens." 68 Am. Jur. 2d *Schools* §5 (1993) (footnote omitted). Although the Court has not explicitly recognized that education is a fundamental right, at least one commentator has made the case that education is a fundamental right under either the Equal Protection Clause or the Due Process Clause of the United States Constitution. *See*

Thomas J. Walsh, *Education as a Fundamental Right Under the United States Constitution*, 29 Willamette L. Rev. 279 (1993).

In addition, state and local governments, as opposed to the federal government, have "primary responsibility for the maintenance and operation of public schools." 68 Am. Jur. 2d *Schools* §5 (footnotes omitted). The Court's statement regarding education from the landmark desegregation case of *Brown v. Board of Education*, 347 U.S. 483 (1954), remains true today: "education is perhaps the most important function of state and local governments." *Id.* at 493.[1] Congress has similarly recognized that state and local governments have primary responsibility for the education of children. The Public Broadcasting Act of 1967, for example, provides that except for purposes of insuring equal opportunity employment, nothing in the Act shall be deemed "to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over . . . the curriculum, program of instruction, or personnel of any educational institution, [or] school system. . . ." 47 U.S.C. §398(a) (1994).

Moreover, television programming is an integral part of education. Congress recognized this proposition when it enacted the Public Broadcasting Act of 1967 and created the National Endowment for Children's Educational Television.

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[1]That function will most certainly be expanded under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (popularly known as the Welfare Reform Bill). The linchpin of any program to move those on welfare to the workplace will be basic education and retraining. DBS technology promises an avenue to reach people in their homes or other least-cost locations with personalized programming to enhance the prospects for success in the workplace. State and local governments need these efficiencies to meet the cost-burden of th is looming responsibility.

The purpose of the National Endowment is "to enhance the education of children through the creation and production of television programming specifically directed toward the development of fundamental intellectual skills." 47 U.S.C. §394(a)(1994).[2] State and local governments, as opposed to the federal government, have accordingly taken an active role in educational programming. Passage of the Public Broadcasting Act "acted as a catalyst for state regulatory activity in the field of educational broadcasting." Robert Paul Sadowski, *An Analysis of Statutory Laws Governing Commercial and Educational Broadcasting in the Fifty States*, at p. 59 (1973). Most states have enacted, amended, or updated statutes on educational broadcasting, and some have even created state agencies dedicated to the development of educational broadcasting. *Id.* at 60. Thus, state and local governments have a strong interest in educational broadcasting.

Here, ACC made a commitment to dedicate part of the broadcasting on its DBS system to educational programming.[3] ACC pledged to donate two transponders on its satellite to the Foundation for Educational Advancement of Today ("FEAT"), which in turn agreed to provide free DBS receivers

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[2]The FCC recently recognized that television is integral to children's education, stating that "[i]t is difficult to think of an interest more substantial than the promotion of the welfare of children who watch so much television and rely upon it for so much of the information they receive." *Policies and Rules Concerning Children's Television Programming*, FCC 96-335 (released Aug. 8, 1996) at ¶ 154.

[3]While 47 U.S.C. §335 (b)(1) (1994) requires a set aside of 4%-7% of programming for noncommercial educational or informational programming by DBS permittees, this set-aside requirement was deemed unconstitutional at the time the FCC terminated ACC's permit. *See Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 8-9 (D.D.C. 1993), *reversed, Time Warner Entertainment Co., L.D. v. Federal Communications Commission*, 93 F.3d 957, 977 (D.C. Cir. 1996).

to schools and libraries across the nation. ACC promised to donate fifteen million dollars ($15,000,000) to FEAT in support of efforts to develop educational networks.[4] The Arkansas General Assembly has appropriated grant funds to FEAT for the purpose of planning such networks. *See* 1991 Ark. Acts 691, 1993 Ark. Acts 768. Yet the FCC's denial of ACC's permit extension jeopardizes the promise that DBS telecasts will contain adequate educational programming. On this basis alone, the citizens of Arkansas and of Little Rock have an important interest in aiding ACC in obtaining a reversal of the FCC's decision.

B. ECONOMIC DEVELOPMENT IS A STATE INTEREST.

The State of Arkansas and City of Little Rock also have a strong interest in economic development. There is little question that economic development within a state is a "strong State interest." *Allstate Ins. Co. v. Stolarz*, 613 N.E.2d 936, 939 (N.Y. 1993). Since the 1930s, state and local governments have attempted to induce industry to locate facilities in their respective areas. *See generally Notes, Legal Limitations on Public Inducements to Industrial Location*, 59 Colum. L. Rev. 618 (1959). The Court has recognized that a state has an interest in fostering economic development. *See Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-29 (1959) (upholding Ohio legislation that gave tax exemption to nonresidents who kept products in warehouses in Ohio for storage only). Other courts have similarly recognized a state's interest in economic development. For example, one court held that legislation giving special treatment to certain types of industrial companies bears a "rational relationship to the promotion of the general welfare, economic development, and prosperity of the

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[4]The interests of FEAT are set out in its Motion for Leave to File Brief Amici Curiae and accompanying brief in support of ACC.

state." *State of Kansas v. Kansas City*, 636 P.2d 760, 778 (Kan. 1981); *see also Barshop v. Medina County Underground Water Conservation Dist*, 925 S.W.2d 618, 634 (Tex. 1996) (upholding as constitutional an act containing a legislative finding that the act was necessary to protect "the operation of existing industries . . . and the economic development in the state"); *W. H. Greenwell, Ltd. v. Department of Land and Natural Resources*, 436 P.2d 527, 529 (Haw. 1968) (holding that a state may use "reasonable means to promote the State's interests in . . . economic development . . ." in the state).

In the present case, prior to the FCC's denial of its extension, ACC had planned to locate its DBS operations in the Little Rock metropolitan area, creating high technology employment and improving the business climate. ACC's DBS operations would have spawned related, high technology economic growth in the area. Now that ACC has been denied a permit to use a DBS broadcast spectrum, ACC no longer has any reason to expand its operations or hire new employees in Arkansas; it may have to cease its operations. The State of Arkansas and the City of Little Rock have a strong interest in supporting ACC's petition for writ of certiorari.

II.

STATE AND LOCAL GOVERNMENTS HAVE AN OBLIGATION TO PURSUE A CHECK ON FEDERAL USURPATIONS OF POWER

The State of Arkansas and the City of Little Rock have an important role in our federalist system of government to seek a check against ACC's denial of procedural due process caused by the FCC's conflict of interest. James Madison, in the Federalist No. 46, explained that both the federal government and the states derive their power from the people: "[n]otwithstanding the different mode in which they are appointed, we must consider both of them [the State Government and the

Federal Government], as substantially dependent on the great body of the citizens of the United States." *The Federalist* No. 46, at p. 315 (James Madison) (Jacob E. Cooke ed., 1961). Madison then stated that both the federal government and state governments stand in a fiduciary relationship with the people: "The Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes." *Id.* One joint obligation of the states and the federal government as fiduciaries to the people is to place a check on usurpations of power by the other:

> [I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power; the General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government. The people, by throwing themselves into either scale, will infallibly make it preponderate. *If their rights are invaded by either, they can make use of the other, as the instrument of redress.*

The Federalist No. 28, at p. 79 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added). The Court has used the same authority, noting that "[p]erhaps the principal benefit of the federalist system is a check on abuses of government power." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

Although the facts are fully developed in the Petition for Writ of Certiorari, a review of some facts relevant to the federal government's fiduciary obligations is necessary. In 1993 the Communications Act was amended to allocate broadcast spectrums by auction. *See* 47 U.S.C. §309(j) (1994). While ACC's petition for review of the International Bureau's decision was pending before the FCC, Congress put significant pressure on the FCC Commissioners to auction ACC's

spectrum. For example, Congress held hearings to consider the FCC's future appropriations, and the Chairman of the House Telecommunications and Finance Subcommittee, Rep. Jack Fields, criticized the FCC Commissioners for allocating licenses by lottery rather than by auction. *Reauthorization of the Federal Communications Commission: Hearing before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce,* 104th Cong., 1st Sess. at 26-27 (1995) (*cited in* Petition for Writ of Certiorari at p. 8) ("Appropriation Hearings"). In addition, at approximately the same time, the Senate voted 98-0 on an amendment to an appropriations bill to mandate the FCC to auction ACC's spectrum. *See* 141 Cong. Rec. S14513, S14513, S14515, S14574, S14586 (daily ed. Sept. 29, 1995) (*cited in* Petition for Writ of Certiorari at pp. 8-9).

Subsequently, under the authority of the Communications Act, the FCC auctioned what had previously been ACC's DBS spectrum for nearly seven hundred thirty-five million dollars ($735,000,000) to MCI Communications Corporation ("MCI") and EchoStar Satellite Corporation ("EchoStar"). *See* Petition for Writ of Certiorari at p. 11. Six days before the FCC affirmed the International Bureau's decision, the President of MCI sent a letter to FCC Chairman Hundt advising him that MCI would submit an opening bid of $175 million for the spectrum. *See* Petition for Writ of Certiorari at pp. 9-10. Chairman Hundt has repeatedly used the auctions, which have raised approximately fifteen billion dollars ($15,000,000,000), as a weapon for persuading Congress and political enemies to refrain from supporting cuts in the FCC budget. Chairman Hundt referred to the FCC as the "Federal Cash Cow" when confronted with then-Presidential candidate Steve Forbes' call for abolition of the FCC. Broadcasting & Cable, Oct. 30, 1995, at 88 (*cited in* Petition for Writ of Certiorari at p. 6). Moreover, Chairman Hundt referred to a Senate subcommittee's vote to cut the FCC's budget by 20% as a mistake that would end the FCC's spectrum auctions. *See* Stern, *Hundt Calls Budget Slash*

"Mistake", Broadcasting & Cable, Sept. 11, 1995, at 13 (*cited in* Petition for Writ of Certiorari at p. 7 n. 2). In fact, Hundt has proposed funding the FCC entirely from auction revenues. Appropriations Hearings at 14-15 (*cited in* Petition for Writ of Certiorari at p. 7). The most damning evidence, however, of the FCC Commissioners' conflict of interest is Chairman Hundt's admission in a speech after the FCC's auction of ACC's spectrum that the money bid by MCI was very influential. *See* Petition for Writ of Certiorari at p. 12.

The federal government has a fiduciary obligation to its citizens, and the inherent conflict of interest created by the FCC's power both to auction the use of broadcast spectrums and to adjudicate the grant or denial of licenses for use of broadcast spectrums creates a situation ripe for a breach of that obligation. The State of Arkansas and the City of Little Rock have a responsibility to their citizens under our federalist system of government to intervene as instruments of redress to seek a check on federal usurpations of power. This responsibility is made all the more important in the present case because the federal government's exercise of its power jeopardizes important interests of the State and City: educational broadcasting and economic development.

SUMMARY OF ARGUMENT

ACC was denied procedural due process of law when the FCC affirmed the International Bureau's refusal to extend ACC's license to use a DBS spectrum and thereafter auctioned the spectrum for seven hundred thirty-five million dollars ($735,000,000). Procedural due process entitles a litigant to an impartial adjudicator. Even the appearance of partiality may constitute a due process violation. Here, the FCC Commissioners each had a pecuniary interest in the outcome of the adjudication because the FCC budget is supplemented by revenue generated by the auctions, and Congress and the President may consider the revenues when establishing the Commissioners' compensation. During the pendency of the adjudication, the FCC was under pressure from Congress with threats of budget cuts to obtain billions of dollars from spectrum auctions. The Senate passed an amendment to an appropriations bill mandating that the FCC auction ACC's spectrum. In addition, the Commissioners received a letter prior to making their decision noting that MCI's opening bid for ACC's spectrum would be approximately one hundred seventy-five million dollars ($175,000,000). Although the Communications Act contains a provision that prohibits the FCC from considering federal revenues generated by auction of spectrums when it adjudicates matters within its purview, this provision does not cure the conflict of interest or serve to establish a cloak of neutrality.

ARGUMENT

I.

ACC WAS DENIED PROCEDURAL DUE PROCESS.

ACC was denied procedural due process when the FCC refused to extend ACC's spectrum permit because the Commissioners, who adjudicated the appeal of the denial, had a pecuniary interest in the outcome of the case. This is a different argument than the one in ACC's Petition for Writ of Certiorari.[5] ACC argues that the FCC must comply with 47 U.S.C. §309(j)(7)(A) to comport with due process. Section 309(j)(7)(A) provides that the FCC "may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding. . . ." 47 U.S.C. §309(j)(7)(A) (1994). The State of Arkansas and the City of Little Rock contend, however, that even if the FCC was disinterested, which it was not, compliance with §309(j)(7)(A) does not cure the appearance of bias. Section 309 is constitutionally infirm on its face: on the one hand, it requires the FCC to grant or deny licenses on the basis of "whether the public interest, convenience, and necessity will be served[;]" and on the other hand, it allows the FCC to retain proceeds from auctions of the licenses in a fund for the "salaries and expenses account of the Commission" as an offset to "the costs of developing and implementing the [auction] program. . . ." 47 U.S.C. §§309(a); (j)(8)(B) (1994).[6]

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[5]While the Court has said it will not ordinarily consider questions raised only by amicus curiae, *see Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 109 n.4 (1991), the Court has both considered and decided questions raised only by amici, even when undecided by the court below. *See Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality opinion).

[6]Here, ACC sought an extension of its license to use a DBS spectrum. The FCC has recognized that extensions of time to commence service promotes "the public interest in prompt initiation of DBS service" *United States Satellite Broadcasting Co.*, 3 FCC Rcd 6858, 6861 (1988). Since then, however, Congress has given the FCC authority to auction the spectrum.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The basic requirements of due process are applicable in adjudicatory administrative proceedings as well. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975).

> This requirement of neutrality in adjudicative proceedings . . . preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done[.]'

Marshall, 446 U.S. at 242 (quoting *Joint Anti-fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).) "This stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties[.]" *Marshall*, 446 U.S. at 243 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)) (internal quotation marks omitted).

The test is whether the administrative adjudicator is in a situation "which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear, and true. . . ." *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for S. California*, 508 U.S. 602, 617-18 (1993) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)) (secondary quotation marks omitted). Adjudicators have an interest sufficient to deny due process of law if their pecuniary interest is based on a desire to generate revenues for the institution over which they have executive powers. *See Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *Tumey v. Ohio*, 273 U.S. 510, 532-34 (1927). Similarly, public officials acting in a quasi-judicial capacity have an interest sufficent to offend due process if the interest is "an indirect outgrowth of a public official's desire to protect official funds." *R.L. Augustine Constr. v. Peoria School Dist.*,

904 P.2d 462, 465 (Ariz. Ct. App. 1995), *review granted*, (Oct. 24, 1995) (citing *Tumey*, at 533-34; *Ward*, at 60); *see United Church of the Medical Center v. Medical Center Comm'n*, 689 F.2d 693, 700 (7th Cir. 1982); *Meyer v. Niles Township*, 477 F. Supp. 357, 362 (N.D. Ill. 1979).

These concepts were applied in *Ward*, where this Court held that procedural due process was violated when a mayor sat as a judge in cases in which convicted petitioners paid fines to the village. An Ohio statute authorized mayors to sit as judges in cases of ordinance violations and certain traffic offenses and to fine convicted petitioners. *Id.* at 57. Although the mayor did not receive his compensation from the fines, a major part of the village's income was derived from the fines imposed by the mayor in his court. *Id.* at 58. The Court noted that "[t]his revenue was of such importance to the village that when legislation threatened its [the revenue's] loss, the village retained a management consultant for advice upon the problem." *Id.* (footnote omitted). The Court stated:

> Plainly that 'possible temptation' may . . . exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court.

Id. at 60.

The Court distinguished the facts in *Ward* from those in *Dugan v. Ohio*, 277 U.S. 61 (1928), where no due process violation was found. In *Dugan* the mayor had judicial functions but only very limited executive authority. *Id.* at 62. The city was governed by a commission of five members, including the mayor, which exercised all legislative powers. *Id.* The Court concluded that in the circumstances present in *Dugan*, the mayor's relationship to the finances and financial policy of the city was too remote to warrant a presumption of bias. *Ward*, 409 U.S. at 60-61. Thus, it is clear from the

holdings in *Ward* and *Dugan* that an adjudicator has a pecuniary interest in the outcome of cases sufficient to constitute a due process violation when the adjudicator has more than a remote relationship to the finances and financial policy of the organization.

ACC's case presents an even more compelling due process violation than that in *Ward*. Like the Mayor in *Ward*, the Commissioners appear partisan because they had an interest in achieving the high level of revenues that the federal government was to receive upon the bidding of ACC's spectrum; pressure from Congress served only to exacerbate the Commissioners' partiality. In addition, the Commissioners have broad powers and duties in relation to the objectives of the FCC, much like the mayor in *Ward* had broad duties and powers in relation to the village. *See* 47 U.S.C. §154(i) (1994).

Furthermore, in *Ward*, the funding was important to the maintenance of the village. Here, too, the funding from auctions is important to the maintenance of the FCC, whether the auctions are used as a weapon to thwart FCC budget cuts or whether the auctions are used to supplement or fully fund the FCC's budget. Moreover, the Court in *Ward* found a due process violation even in the absence of a link between the mayor's compensation and the village fund. Here, however, the level of the FCC Commissioners' compensation is arguably linked to the revenues generated by its spectrum auctions.[7]

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[7]The Commissioners' salary is set pursuant to 5 U.S.C. §§5314 and 5315. 47 U.S.C. §154(d) (1994). The provisions of 5 U.S.C. §§5314 and 5315 establish that compensation shall be based on the considerations found in 2 U.S.C. §§351 *et. seq.* 5 U.S.C. §§5314 and 5315 (1994). Under 2 U.S.C. §358, the Commissioners' compensation may be based on what is "fair and reasonable," "the prevailing market value of the services rendered in the offices and positions involved, the overall economic condition of the country, and the fiscal condition of the Federal Government." 2 U.S.C. §358(a) (1994). Thus, Congress and the President have the ability to reward the Commissioners for reaping approximately fifteen billion dollars

ACC, therefore, was denied procedural due process because the Commissioners served as adjudicators in a case in which they had an interest in generating revenues for the institution over which they have executive powers. The Commissioners had an interest in the termination of ACC's permit that was a direct outgrowth of the Commissioners' desire to enhance and protect the FCC's budget. Accordingly, the provisions of the Communications Act giving the FCC authority both to adjudicate the grant or denial of permits and to auction those same permits are constitutionally infirm. *Cf. United Church*, 689 F.2d at 699-700 (holding as unconstitutional a statute allowing a commission to adjudicate title reverter hearings in which title to property might revert to the commission); *R.L. Augustine*, 904 P.2d at 465-67 (holding as unconstitutional a statute permitting a school district board to adjudicate construction contract disputes in which the school district was a party); *cf. also Meyer*, 477 F.Supp. at 361-62 (concluding that the structure of a committee was unconstitutional where the committee was comprised of town officials with sole discretion to award medical benefits, payment of which was derived from township funds).

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[7]continued
($15,000,000,000) in spectrum auction proceeds for the federal government. In addition:

> [T]he salaries and expenses account of the Commission shall retain as an offsetting collection such sums as may be necessary from such [auction] proceeds for the costs of developing and implementing the program required by this subsection.

47 U.S.C. §309(j)(8)(B) (1994). Whether or not the salaries and expenses account redounds to the direct benefit of the Commissioners, the account benefits the FCC as an organization.

II.

A CLOAK OF NEUTRALITY CANNOT BE ESTABLISHED BY A STATUTORY PROVISION.

The Respondents are likely to argue that any appearance of partiality by the Commissioners is cured by the amended Communications Act itself, which provides that the FCC "may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding. . . ." 47 U.S.C. §309(j)(7)(A) (1994). This provision, however, does not remedy the appearance of partiality.[8] A due process violation cannot be cured on the ground that a statute requires a judge to disregard the very interest which makes him or her appear partial.

In *Ward, supra,* the village asserted that an Ohio statute which provided for disqualification of interested, biased, or prejudiced judges was a sufficient safeguard to protect the rights of the petitioner. *Ward,* 409 U.S. at 61. The Court rejected this argument. In fact, the Court has rejected the proposition that procedural safeguards can protect against due process violations when judges have pecuniary interests in the outcome of cases over which they preside. *See Brown v. Vance,* 637 F.2d 272, 279 (5th Cir. 1981) (citing *Ward* and *Tumey*). The Court, consequently, has recently reiterated the proposition it stated forty years ago in *Murchison:*

> '[J]ustice,' indeed, 'must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally

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[8]Indeed, Respondents can argue only that the statute cures the *appearance* of partiality. If the Commissioners were biased, this statutory provision cannot cure the due process violation; the Commissioners will have violated the statute itself.

between contending parties.'

Concrete Pipe, 508 U.S. at 618 (quoting *Marshall*, 446 U.S. at 243). Even if the Commissioners in the present case followed the letter of the Communications Act and did their very best to be fair, justice nevertheless requires the appearance of justice. The Respondents cannot escape that FCC Commissioners played the role of adjudicators in a case in which they appeared to have a pecuniary interest. No statute can cure this appearance. Furthermore, "[e]ven appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator." *Concrete Pipe*, 508 U.S. at 618. In other words, a full review by an appelate court is not sufficient to cure a procedural due process violation. If full review by learned appellate judges is not enough, an unenforced provision in a statute certainly will not remedy the appearance of partisan adjudication.

The Amici do not contend, however, that Congress is powerless to delegate to an agency the authority to adjudicate on the basis of public benefit the grant and denial of permits to use resources under the agency's care. In addition, the Amici do not contend that Congress is powerless to enact legislation enabling an agency to conduct auctions of the resources of which the agency is a steward. The agency, however, still has a fiduciary obligation to the public with respect to allocation of the resources. With respect to broadcast licenses, Congress recognized this fiduciary obligation when it enacted §309(j)(3)(A), which provides that a spectrum must be allocated for the "benefit of the public." A fatal defect arises, however, when a statute gives an agency both the power to adjudicate whether the conditions of assignment of resources have been met and the power to auction those resources to raise revenue; those functions must in fact and law be separated to pass constitutional muster. Congress recognized the inherent conflict of interest when it enacted §309(j)(7)(A), which prohibits consideration of federal revenues in the allocation of

DBS spectrums and other frequency bands. Yet, this statutory provision cannot alleviate the FCC's appearance of partiality as an adjudicator in this case because the statute is part of a scheme that leaves the adjudicatory function in the hands of those with a participation in the fundraising function.

CONCLUSION

For over ten years, ACC complied with the rules and regulations promulgated by the FCC and invested substantial sums of money and time in developing DBS technology. At the time its spectrum license was terminated, ACC was less than a year from the scheduled launching of its DBS satellites. The market adapted over the years in reliance on the FCC's rules and regulations, and the market efficiently brought together essential commitments and players to launch the system. Among these commitments was the dedication by ACC of substantial resources to establish direct broadcasting as a vital and pervasive educational tool. The FCC, however, under pressure to reap a windfall from spectrum auctions, suddenly changed the rules and auctioned ACC's spectrum to wealthy ventures, thereby making DBS spectrums available only to entities with billions of dollars, entities which otherwise have little expertise in DBS technology. This action distorted the market's performance. Such a result is particularly curious when weighed against the congressionally mandated purpose of utilizing spectrum auctions to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public[.]" 47 U.S.C. §309(j)(3)(A) (1994). Therefore, the Amici Curiae, the State of Arkansas and the City of Little Rock, respectfully request the Court to grant the Petition for Writ of Certiorari and review the decision of the United States Court of Appeals for the District of Columbia

Circuit perfunctorily affirming the FCC's decision to terminate ACC's license to use a DBS spectrum.

Respectfully Submitted,

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